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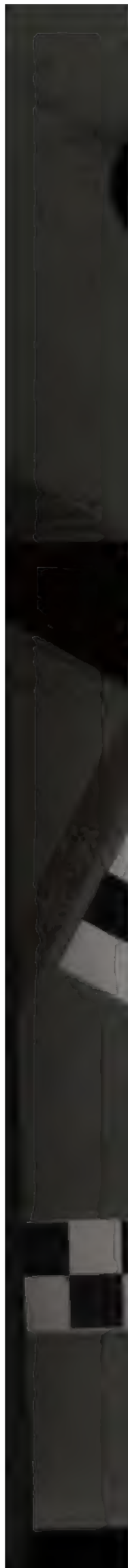
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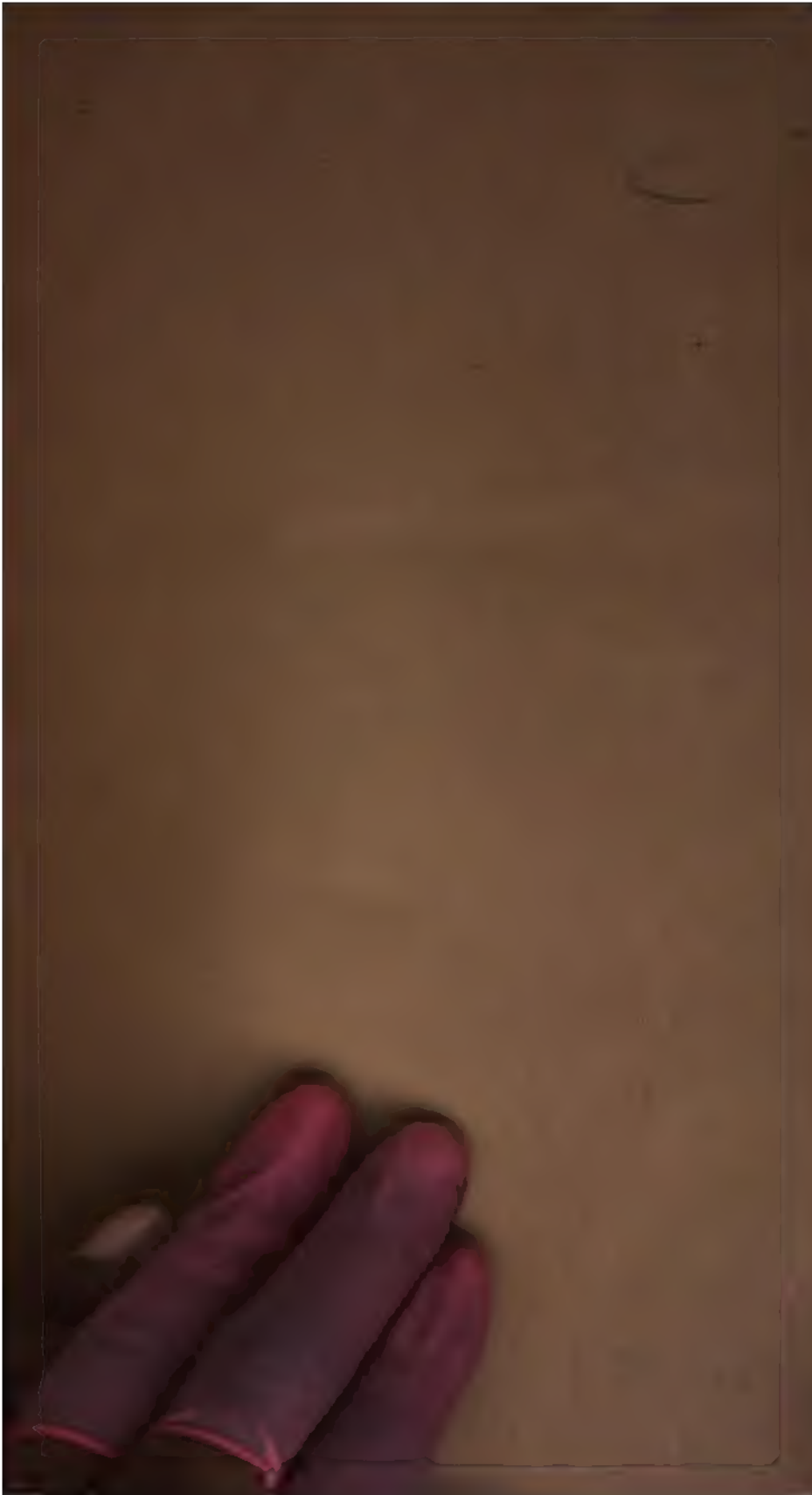
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# TREATISE

ON

## Crimes & Misdemeanors.

IN TWO VOLUMES.

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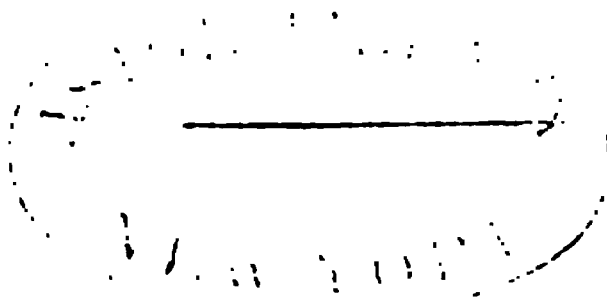
By WM. OLDNALL RUSSELL,  
OF LINCOLN'S INN, ESQ. BARRISTER-AT-LAW.

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First American Edition;  
WITH ADDITIONAL NOTES OF DECISIONS IN THE AMERICAN COURTS.

By DANIEL DAVIS,  
SOLICITOR GENERAL OF MASSACHUSETTS.

VOLUME II.



BOSTON:

WELLS AND LILLY—COURT-STREET.

.....

1824.

.....

**DISTRICT OF MASSACHUSETTS, to wit :**

*District Clerk's Office.*

**BE IT REMEMBERED**, that on the thirteenth day of April, A. D. 1834, in the forty-eighth year of the Independence of the United States of America, Wells and Lilly of the said District, have deposited in this Office the Title of a Book the Right whereof they claim as Proprietors, in the Words following, to wit :

A Treatise on Crimes and Misdemeanors. In two volumes. By Wm. Oldell Russell, of Lincoln's Inn, Esq. Barrister-at-law. First American Edition ; with additional Notes of decisions in the American Courts. By Daniel Davis, Solicitor General of Massachusetts.

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**JNO. W. DAVIS.**

*Clerk of the District of Massachusetts.*

TREATISE  
ON  
CRIMES  
AND  
MISDEMEANORS.

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BOOK THE FOURTH.

OF OFFENCES AGAINST PROPERTY, PUBLIC OR PRIVATE.

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CHAPTER THE FIRST.

*Of Burglary (1)*

**I**T is laid down in the more ancient authorities that the offence of burglary may be committed by the felonious breaking and entering of a church, and the walls or gates of a town, in time of peace, as well as by the felonious

Definition  
of the of-  
fence.

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(1) NEW YORK.—The breaking open in the night time of a store at the distance of twenty feet from a dwelling house, but not connected with it by fence or inclosure, is not burglary, and per curiam, “the store was not within the curtilage, as there was no fence or yard, inclosing the dwelling house and store, so as to bring them within one enclosure. This brings the case within that of the *King v. Garland* (Leach 130) and distinguishes it from *Gibson’s* case (Leach 287.) *The People v. Parker*, 4 Johns. Rep. 424.

NEW JERSEY.—The following points were decided in the case of the *State v. Wilson*, (1 Cox’s Rep. 439.) 1. If a man lifts up the latch of an outward door, or if the out-ward door being open, he enters and unlatches or



breaking and entering of a private house. (a) But the \*more material enquiry at the present day relates to the breaking and entering of private houses, or, in the language of the books, the mansion-houses of individuals : and this species of the offence appears to be well described, as—*A breaking and entering the mansion-house of another, in the night, with intent to commit some felony within the same, whether such felonious intent be executed or not.* (b)

a Staundf. P. C. 30. 22 Ass. pl. 95. Bitt. c. 10. Dalt. c. 99. Crim. 31. Spelm. in verb. *Burglaria*. In 3 Inst. 64, Lord Coke gives as a reason for considering the breaking and entering a church as a burglary, that the church is *domus mansionalis omnipotentis Dei* : but Hawkins says that he does not find this nicety countenanced by the more ancient authors ; and that the general tenor of the old books seems to be that burglary may be committed in breaking houses, or churches, or the walls, or gates, of a town. 1 Hawk. P. C. c. 38. s. 17. And in 4 Black. Com. 224. it is stated that breaking open a church is undoubtedly burglary.

b 3 Inst. 63. 1 Hale 549. Sum. 79. 1 Hawk. P. C. c. 38. s. 1. 4 Black. Com. 224. 2 East. P. C. c. 15. s. 1. p. 484. 1 Burn. Just. *Burglary*, S. 1. The word *burglar* is supposed to have been introduced from Germany by the Saxons ; and to be derived from the German, *burg*, a house, and *larron*, a thief ; the latter word being from the Latin *latro*. 1 Burn. Just. *Burgl.* S. 1. 2 East. P. C. c. 15. s. 1. p. 484. But Sir H. Spelman

thinks that the word *burglaria* was brought here by the Normans, as he does not find it amongst the Saxons : and he says that *burglatores*, or *burgalores*, were so called, *quod dum alii per campos latrocinantur eminus, hi burgos pertinacius effringunt, et depre-dantur*. The crime, however, appears to have been noticed in our earliest laws, in the common genus of offences denominated *Hamsacken* ; and by the ancient laws of Canutus, and of H. 1. to have been punishable with death. Ll. Canuti, c. 61. Hen. I. c. 13. 1 Hale, 547. citing Spelm. Gloss. tit. *Hamsacken*, and *ibid.* tit. *Burglaria*. Originally, the circumstance of *time*, which is now of the very essence of the offence, does not seem to have been material ; and the malignity of the crime was supposed to consist merely in the invasion on the right of habitation, to which the laws of England have always shewn an especial regard, herein agreeing with the sentiments of ancient Rome, as expressed in the words of Cicero : *Quid enim sanctius, quid omni religione munitius, quàm domus uniuscujusque civium ? Hic*

unlocks a chamber door, it is such a breaking as is necessary to enter into the crime of burglary.

2. If all the doors are open, and a thief enters, though he should afterwards break open a chest or cupboard, it is not such a breaking as to constitute burglary.

3. Before one can be convicted of burglary, there ought to be evidence to prove that the doors were shut, and were opened by the prisoner, or by his concurrence.

4. If one takes the goods of another out of the place where they were put, though he is detected before they are actually carried away, the larceny is complete. 1 Cox's Rep. 439.

PENNSYLVANIA.—In an indictment for burglary, the word *mansion-house*, is a good description of the premises : the court say, “the *house* is sufficiently described as a *dwelling* house, by the word *mansion*.” Commonwealth v. Pennock, 3 Serg. & R. 199.

MASSACHUSETTS.—Burglary was a capital offence in this state, until the Statute of 1805, Chap. 101 ; by which Statute the punishment was reduced to hard labour for life, when committed by a person without being armed with a dangerous weapon, or without arming himself in the house with a dangerous weapon, and without committing an assault upon any person lawfully being in such house. Where the offence is committed with these circumstances of aggravation, it is still punished capitally.

•Pursuing the order of this definition, we may consider, I. Of the breaking and entering: II. Of the mansion-house: III. Of the time; namely, the night: IV. Of the intent to commit a felony.

I. Notwithstanding some loose opinions to the contrary, which may have been formerly entertained, it is now well settled that both a breaking and entering are necessary to complete the offence of burglary. (c)

A breaking and entering are both necessary.

With respect to the breaking, it is agreed that it is not every entrance into a house, in the nature of a mere trespass, which will be sufficient, or satisfy the language of the indictment, *felonici et burglariter freget*. (d) Thus, if a man enter into a house by a door, or window, which he finds open, or through a hole, which was made there before, and steal goods; or draw goods out of a house through such door, window, or hole, he will not be guilty of burglary. (e) There must either be an actual breaking of some part of the house, in effecting which more or less of actual force is employed; or a breaking by construction of law, where an entrance is obtained by threats, fraud, or conspiracy.

An actual breaking of the house may be by making a hole in the wall; by forcing open the door; by putting back, picking, or opening the lock with a false key; by breaking the window; by taking a pane of glass out of the window; by drawing or bending the nails, or other fastening; or by putting back the leaf of a window, with an instrument. And even the drawing or lifting up the latch, where the door is not otherwise fastened; the turning the key where the door is locked on the inside; or the unloosing any other fastening, which the owner has provided, will amount to a breaking. (f)

Of an actual breaking.

It was doubted on one occasion whether a thief, getting into a house by creeping down the chimney, could be found guilty of burglary, as the house, being open in that part, could not be said to have been actually broken; (g) but it

[\* 902]

*are sunt, huc fori—huc per fugiunt est etu sanctum viciibus, ut inde subripit neminem fas est.* The learned editor of Bacon's Abridgment says that his researches had not enabled him to discover at what particular period time was first deemed essential to the offence; but that it must have been so settled before the reign of E. VI., as in the fourth year of that king it is expressly laid down that it shall not be adjudged burglary, nisi ou le infreindor del maison est per noctem, (Bro. tit. Corone, pl. 185) and that, two years before, per noctem is introduced (*Id.* p. 130.) as of course in the mention of the offence. 1 Bac. Ab. Burglary, 530. (ed. 1807.) And see 3 Inst. 65.

c 1 Hawk. P. C. c. 38. s. 3. 1 Hale 551. 4 Black. Com. 236

d 3 Inst. 64. 1 Hawk. P. C. c. 38. s. 4. 1 Hale 551, 552.

e *Id.* *Ibid.* For if a person leaves his doors or windows open, it is his own folly and negligence; and if a man enters therein it is no burglary. 1 Black. Com. 226.

f 1 Hale 552. 3 Inst. 64 Sum. 80. 1 Hawk. P. C. c. 38. s. 6. 2 East, P. C. c. 15. m 3. p. 487.

g 1 Hale 552, where the learned author says that he was doubtful whether it was burglary, and so were some others; but that upon examination it appeared that in the creeping down of the prisoner, some of the bricks of the chimney were loosened, and fell down in the room, which put it out of question; and direction was given to find it burglary.

appears to be now agreed that such an entry into a house will amount to a breaking, on the ground that the house is as much closed as the nature of things will permit. (*h*)

Brown's case. Breaking, where there were no interior fastenings.

A case is reported, in which the breaking was holden to be sufficient, though there was no interior fastening to the doors which were opened. It appeared that the place which the prisoner entered was a mill, under the same roof, and within the same curtilage, as the dwelling house: that through the mill there was an open entrance, or gateway, capable of admitting waggons, and intended for the purpose of loading them more easily with flour, by means of a large aperture, or hatch, over the gateway, communicating with the floor above; and that this aperture was closed by folding doors, with hinges, which fell over it, and remained closed by their own weight, but without any interior fastening; so that persons on the outside, under the gateway, could push them open at pleasure, by a moderate exertion of strength. It was proved that the prisoner entered the mill in the night, by so pushing open the folding doors, with

[\* 903] \*the intention of stealing flour: and this was holden to be a sufficient breaking by the learned judge, who tried the prisoner; and the prisoner was accordingly convicted of burglary. (*i*)

Callon's case. The fastening of a trap-door or flap of a cellar being by the compression only caused by its natural weight; it was holden that the opening it did not constitute a sufficient breaking.

But a different doctrine appears to have been holden by the judges, in a case where, though there were interior fastenings to the place broken open, which was the trap-door, or flap of a cellar, yet the fastenings were not in use at the time; and the trap-door or flap remained closed only by the compression caused by its natural weight. The prisoner was indicted for stealing some bottles of wine in a dwelling-house, and afterwards burglariously breaking out of the house. It appeared in evidence, that the wine was taken from a bin in the cellar of the house, which was a public-house, and removed by the prisoner from the bin to the trap-door, or flap, of the cellar, in getting out of which he was apprehended. The cellar was closed on the outside, next the street, only by the flap, which had bolts belonging to it, for the purpose of bolting it on the inside, and was of considerable size, being made to cover the opening through which the liquors consumed in the public-house were usually let down into the cellar. The flap was not bolted on the night in question: but it was proved to have been down; in which situation it would remain, unless raised by considerable force. When the prisoner was first discovered, his head and shoulders were out of the flap; and upon an attempt being made to lay hold of him, he made a spring, got quite out, and ran away, when the flap fell down, and closed in its usual way,

*h* Crompt 32, (*b*) Dalt. 253. 1 Hawk. P. C. c. 38. s. 6. 2 East. P. C. c. 15. s. 2. *i* Brown's case, *Winton*, Spr. Ass. 1799, *car*. Buller, J. 2 East. P. C. c. 15. s. 3. p. 487. p. 485.

by its own weight. Upon this evidence it was doubted whether there was a sufficient breaking to constitute the crime of burglary; and the prisoner having been convicted, the question was saved by the learned judge who presided at the trial, for the opinion of the twelve judges, who are understood to have holden the conviction \*bad, on the ground that there was not a sufficient breaking. (k)

[\* 904]

The book 29 Assiz. 95., in which burglary is defined as the breaking of houses, churches, walls, courts, or gates in time of peace, is referred to by Lord Hale, as seeming to lead to the conclusion, that where a man has a wall about his house for its safeguard, if a thief should in the night-time break such wall, or the gate thereof, and finding the doors of the house open, should enter the house, it would be burglary; though it would be otherwise if the thief should get over the wall of the court, and so enter through the open doors of the house. (l) But upon this it has been remarked, that the doctrine referred to by Lord Hale was anciently understood only as relating to the walls or gates of a city; and does not, therefore, support his conclusion, when he applies it to the wall of a private house. (m) And the distinction between breaking and coming over the gate or wall is spoken of by an able writer as being over-refined: for if, as he observes, the gate or wall be part of the mansion for the purpose of burglary, and be inclosed as much as the nature of the thing will admit of, it seems to be immaterial whether it be broken or overleaped, and more properly to fall under the same consideration as the case of a chimney; and that if it be not part of the mansion-house for this purpose, then whether it be broken or not is equally immaterial, as in neither case will it amount to burglary. (n)

Breaking a wall, built about a house for its safeguard

It should be observed, that the breaking requisite to constitute a burglary, is not confined to the external parts of the house, but may be of an inner door, after the offender has entered by means of a part of the house which he has found open. Thus, if A. enter the house of B. in the night time, the outward door being open, or by an open window, \*and, when within the house, turn the key of a chamber door, or unlatch it, with intent to steal, this will be burglary. (o) And it will also amount to burglary if a servant in the night time open the chamber door of his master or mistress, whether latched or otherwise fastened, and enter for the purpose of committing murder or rape, or with any other felonious design; or if any other person, lodging in the same house, or in a public inn, open and enter another's door, with such evil

The breaking may be of an inner door of the house.

[\* 905]

l Callow's case, cor. Lord Ellenborough.

C. J., O. B. November, 1809. MS.

l 1 Hale 359.

m Note (n) 1 Hale 359, ed. 1800.

n 2 East, P. C. c. 15. s. 4. p. 488.

o 1 Hale 553, 1 Hawk. P. C. c. 38. s. 6. Johnson's case, Mich. T. 1786, 2 East, P. C. c. 15. s. 4. p. 488.

intent. (p) But it has been questioned whether, if a lodger in an inn should, in the night time, open his chamber door, steal goods, and go away, the offence would be burglary; on the ground of his having a kind of special property and interest in his chamber, and the opening of his own door being therefore no breaking of the innkeeper's house. (q)

Q<sub>u</sub>. As to the breaking of cupboards, &c. fixed to the freehold.

[\* 906]

It is clear that the breaking open of a chest, or box, by a thief who has entered by means of an open door or window, is not a kind of breaking which will constitute burglary, because such articles are no part of the house. (r) But the question with respect to the breaking of cupboards, and other things of a like kind, when affixed to the freehold, has been considered as more doubtful. Thus, at a meeting of the judges, upon a special verdict, to consider the point, whether breaking open the door of a cupboard let into the wall of the house were burglary or not, it appears that they were divided upon the question. (s) But Lord \*Hale says, that such breaking is not burglary at common law. (t) And Mr. J. Foster thinks that, with regard to cupboards, presses, lockers, and other fixtures of the like kind, a distinction should be taken, in favour of life, between cases relative to mere property, and such wherein life is concerned. He says, "In questions between the heir or devisee, and the executor, those fixtures may, with propriety enough, be considered as annexed to, and parts of the freehold. The law will presume, that it was the intention of the owner, *under whose bounty the executor claims*, that they should be so considered; to the end that the house might remain to those who, by operation of law, or by his bequest, should become entitled to it, in the same plight he put it, or should leave it, entire and undefaced. But in capital cases, I am of opinion that such fixtures which merely supply the place of chests, and other ordinary utensils of household, should be considered in no other light than as mere moveables, partaking of the nature of those utensils, and adapted to the same use." (u)

Of a breaking out of the house.

Though it was said to be the law, that the entering into the house of a person, without breaking it, with an intent to commit some felony, and afterwards breaking the house in the night-time to get out, was burglary; yet, the doctrine was questioned by great authority: (x) and it was

p 1 Hale 553, 554. 4 Blac. Com. 227. Bingle's case, 2 W. and M. MS. Denton, cited 2 East. P. C. c. 15. s. 4. p. 488. Gray's case, 1 Str. 481. Sum. 82, 84. 1 Bac. Ab. *Burglary*. (A)

q 1 Hale 554. But upon this it is observed, that if another person should open such lodger's door burglariously, it must be laid to be the mansion of the innkeeper, and that a guest may commit larceny of the things delivered to his charge. 2 East. P. C. c. 15. s. 4. p. 488.

r 1 Hale 523, 524, 555. 1 East. P. C. c. 15. s. 5. p. 488, 489.

s Fost. 108. citing MS. Denton. The meeting of the Judges was in *January* 1690.

t 1 Hale 527.

u Fost. 109. And see 2 East. P. C. c. 15. s. 5. p. 489.

x By Lord Holt and Trevor, C. J. in Clarke's case, O. B. 1707. 2 East. P. C. c. 15. s. 6. p. 490. And the question is also stated in 1 Hale 554. where he says, "If a man enter in the night time by the doors



thought expedient to remove the doubt by legislative enactment. \*The statute 12 Anne, stat. 1. c. 7. s. 3. (reciting [\* 907] that there had been some doubt upon the subject) declares and enacts, "that if any person shall enter into the mansion or dwelling house of another by day or by night, without breaking the same, with an intent to commit felony, or being in such house shall commit any felony, and shall in the night time break the said house to get out of the same, such person is and shall be adjudged and taken to be guilty of burglary, and shall be ousted of the benefit of his and her clergy, in the same manner as if such person had broke and entered the said house in the night time, with an intent to commit felony there."

Having mentioned these points relating to an actual breaking, we may now enquire concerning a breaking by construction of law, where an entrance is obtained by threats, fraud, or conspiracy.

Where in consequence of violence commenced or threatened, in order to obtain entrance to a house, the owner, either from apprehension of the violence, or in order to repel it, opens the door, and the thief enters, such entry will amount to a breaking in law: (y) for which some have given as a reason that the opening of the door by the owner, being occasioned by the felonious attempt of the thief, is as much imputable to him as if it had been actually done by his own hands. (z) But if, upon a bare assault upon a house, the owner fling out his money to the thieves, it will not be burglary: (a) though if the money were taken up in the owner's presence, it is admitted that it would be robbery. (b) And though the assault were so considerable as to break a hole in the house; yet if there were no entry by the thief, but only a carrying away of the money thrown out to him \*by the owner, the offence could not, it should seem, be burglary, though certainly robbery. (c) [By threats. [\* 908]

Where an act is done in *fraudem legis*, the law gives no benefit thereof to the party. Thus if thieves, having an intent to rob, raise hue and cry, and bring the constable, to whom the owner opens the door, and they, when they come [By fraud.]

opened, with the intent to steal, and is pursued, whereby he opens another door to make his escape; this, I think, is not burglary, against the opinion of Dalt. p. 253. (new edit. p. 457) out of Sir Francis Bacon: for *fregit et cavit, non fregit et inducit*." Lord Bacon thought it was burglary. Elem. 65.

y Crompt. 12. (a) 1 Hale 553. 2 East. P. C. c. 12. s. 2. p. 486.

z 1 Hawk. P. C. c. 30. s. 7.

a 1 Hawk. P. C. c. 30. s. 3.

b Sum. 81. 2 East. P. C. c. 15. s. 2. p. 486.

c 1 Hale 555, but he says, that some have held it burglary, though the thief never enter-

ed the house: and that it is reported to have been so adjudged by Saunders, chief baron. Crompt. 31. L. Lord Hale subjoins to this doctrine *tamen quæres*; and certainly, as a part of the statement of the case is, that there was no entry into the house, and as an entry is, as will be presently shown, an essential part of the offence as the breaking, it seems difficult to discover the ground on which it could have been ruled to be burglary. The editor of Lord Hale (ed. 1800) states in a note, that it was adjudged by Montague, chief justice of the C. B. and that Saunders only related it



in, bind the constable, and rob the owner, it is burglary. (*d*) And, upon the same principle, the getting possession of a dwelling house by a judgment against the casual ejector, obtained by false affidavits without any colour of title, and then rifling the house, was ruled to be within the statute against breaking the house, and stealing the goods therein. (*e*) So if a man go to a house under pretence of having a search warrant, or of being authorised to make a distress, and by these means obtain admittance, it is, if done in the night-time, a sufficient breaking and entering, to constitute burglary, or, if done in the day-time, house-breaking. (*f*)

If admission to a house be gained by fraud, not carried on under the cloak of legal process, as by a pretence of business, it will also amount to a breaking by the construction of law. Accordingly it was adjudged, that where thieves came to a  
[\* 909] house in the night-time, with intent to \*commit a robbery, and knocked at the door, pretending to have business with the owner, and, being by such means let in, robbed him, they were guilty of burglary. (*g*) And so where some persons took lodgings in a house, and afterwards, at night, while the people were at prayers, robbed them: it was considered, that the entrance into the house being gained by fraud, with an intent to rob, the offence was burglary. (*h*) For the law will not endure to have its justice defrauded by such evasions. (*i*)

A case is also reported, where the entrance to the house was gained by deluding a boy who had the care of it. It appeared upon the evidence, that the prisoner was acquainted with the house, and knew that the family were in the country; and that upon meeting with the boy who kept the key, she desired him to go with her to the house; and, by way of inducement, promised him a pot of ale. The boy accordingly went with her, opened the door, and let her in; upon which she sent him for the pot of ale, and, when he was gone, robbed the house, and went away. And this being *in the night time*, it was adjudged that the prisoner was clearly guilty of burglary. (*k*)

By conspiracy.

The breaking may also be by conspiracy. Thus where a servant conspired with a thief to let him into his master's house to commit a robbery, and in consequence of such agreement, opened the door or window in the night time, and let him in; this, according to the better opinion, was considered to be burglary in both the thief and the servant. (*l*)

*d* 3 Inst. 64. 1 Hale 552, 553. Sum. 81. Crompt. 32 b. Kel. 44, 82. 1 Hawk. P. C. c. 38. s. 10. 4 Black. Com. 226.

*e* Farre's case, Kel. 43.

*f* *Per Cur.* in Gascoigne's case, 1 Leach 284.

*g* Le Mott's case, Kel. 42. 1 Hawk. P. C. c. 38. s. 8.

*h* Casey and Cotter (case of) Kel. 62, 63, 1 Hawk. P. C. c. 38. s. 9. referred to by the

court, in giving judgment in Semple's case, 1 Leach 424.

*i* 1 Hawk. P. C. c. 38. s. 9. 4 Black. Com. 227. 2 East. P. C. c. 15. s. 2. p. 485.

*k* Hawkins's (Ann) case, O. B. 1704. 1 East. P. C. c. 15. s. 2. p. 485, cited from MS. Tracy 80. and MS. Sumn.

*l* 1 Hale 553. 1 Hawk. P. C. c. 38. s. 14. 4 Black. Com. 227. In Dalt. c. 99. p. 253. (later ed. p. 487.) it is supposed only to be

\*And this doctrine is confirmed by a subsequent decision. Two men were indicted for burglary; and, upon the evidence, it appeared, that one of them was a servant in the house where the offence was committed; that in the night time he opened the street door, let in the other prisoner, and shewed him the side-board, from whence the other prisoner took the plate; that he then opened the door, and let the other prisoner out; did not go out with him, but went to bed. And upon these facts being found specially, all the judges were of opinion, that both the prisoners were guilty of burglary; and they were accordingly executed. (m)

It may be here mentioned, that in the case of a servant opening a door of his master's house for a felonious purpose, without any plan or conspiracy with other persons to commit a robbery, it seems to have been considered, that the question whether such act will amount to a breaking must depend upon the point, whether the door might have been opened by the servant in the course of his trust and employment. Thus, it is said, that if a servant unlatch a door, or turn a key in a door of his master's house, and steal property out of the room; such opening of the door, being within his trust, is not a breaking: but that if a servant break open a door, whether outward or inward, (as a closet, study, or counting house,) and steal goods, such opening, not being within his trust, will amount to a breaking of the house, either within the statutes relating to the breaking of dwelling houses in the day time, or within the law of burglary. (n)

By ser-  
vants.

With respect to the entering necessary to constitute burglary: it is agreed, that any, the least, entry either with the whole or any part of the body, hand, or foot, or with any instrument or weapon, introduced for the purpose of committing a felony, will be sufficient. (o) Thus, where the prisoner, in the night time, cut a hole in the window shutters of the prosecutor's shop, which was part of the dwelling-house, and putting his hand through the hole, took out watches and other things, which hung in the shop, within his reach, it was holden to be burglary. (p) So, if a thief breaks the window of a house in the night time, with an intent to steal, and puts in a hook or other engine, to reach out goods; or puts a pistol in at the window with intent to kill; this is burglary, though his hand be not within the window. (q) And, in a case where thieves came in the night to rob A., who perceiving it opened his door, issued out, and struck one of the

Of the en-  
tering ne-  
cessary to  
constitute  
a burglary.  
[\* 911]

in the night time; but, Lord Hale says, it seems to be burglary in both, for if it be burglary in the first, it must also be so in the second, because he is present and aiding the thief to commit a burglary.

(m) *Corwall case*, 2 Str. 331. 1 Hawk. P. C. c. 17. s. 14. 19 St. Tr. (Howel) 782 in the 2d.

(n) 2 Hale 354, 355.

(o) 3 Inst. 64. 1 Hale 555, Sum. 80. 1 Hawk.

1 C. c. 38, s. 11, 12. 1 And. 115. Lamb. c.

2, p. 261. Fost. 108. 4 Black. Com. 227. 1

Bacon. Ab. Burgl. (B.)

(p) *Gibbons's case*, 1 Inst. 107, 108.

(q) 3 Inst. 64. 1 Hale 555, Sum. 80.

thieves with a staff, when another of them, having a pistol in his hand, and perceiving persons in the entry ready to interrupt them, put his pistol within the door, over the threshold, and shot, in such manner that his hand was over the threshold, but neither his foot nor any other part of his body, it was adjudged burglary by great advice. (r)

Discharging a gun, &c. on the outside of the house.

[\* 912]

Though it is admitted that a person putting a pistol in at a window with intent to kill, thereby makes a sufficient entry, to constitute a burglary, yet it has been questioned whether if he should shoot *without* the window, and the bullet come in, the entry would be sufficient. (s) It is, however, elsewhere laid down, that to discharge a loaded gun into a house is a sufficient entry. (t) And a learned \*writer has observed, that it seems difficult to make a distinction between this kind of implied entry, and that which is effected by means of an instrument introduced within the window or threshold, for the purpose of committing a felony; unless it be that the one instrument by which the entry is effected is holden in the hand, and the other discharged from it: but that no such distinction is any where laid down in terms. (u)

Introduction of an instrument, in the act of breaking the house.

It appears, however, that the mere introduction of an instrument, in the act of breaking the house, will not make a sufficient entry; but that the instrument by which the entry is effected must be introduced for the purpose of committing a felony. So that where a thief broke a hole in a house, intending to rob the owner, but had not otherwise entered, when the owner for fear threw out his money to him, and he went off with it; the better opinion appears to have been, that it was not burglary. (x) In another case it appeared in evidence that the prisoners had bored a hole with an instrument called a *centre-bit* through the pannel of a house door, near to one of the bolts by which it was fastened; and that some pieces of the broken pannel were found withinside the threshold of the door; but it did not appear, that any instrument except the point of the *centre-bit*, or that any part of the bodies of the prisoners had been withinside the house, or that the aperture made was large enough to admit a man's hand: and the court held this not to be a sufficient entry. (y)

Where a glass window was broken, and the window opened with the hand, but the shutters in the *inside* were not broken, it was ruled to be burglary, but considered as going to the extremity of the law. (z)

r 1 Hale 553. Crompt. 32 (a) 2 East. P. C. c. 15. s. 7. p. 490.

s 1 Hale 555, where it is said that this seems to be no entry, to make a burglary: but a *quære* is added.

t 1 Hawk. P. C. c. 38. s. 11.; and it appears to have been ruled by Lord Ellenborough, C. J. that a person discharging a gun from the outside of a field, into it, so as that the shot must have struck the soil, was guilty

of breaking and entering the field. See Pickering v. Rudd, 4 Campb. 220. 1 Stark. R. 58.

u 1 East. P. C. c. 15. s. 7. p. 490.

x 1 Hale 555, *ante* 908. note (c)

y Hughes and others (case of) O. B. 1785. 1 Leach 406. 1 Hawk. P. C. c. 38. s. 12. 2 East. P. C. c. 15. s. 7. p. 491.

z Roberts's, *alias* Chambers's case, O. B. 1702. 1 East. P. C. c. 15. s. 3. p. 487. It was

\*The entry need not be made on the same night as the breaking, though both must be done in the night time: (a) but this point will be more properly mentioned in treating of the time at which this offence may be committed.

Entry need not be made the same night as the breaking.

The doctrine which has been laid down, respecting principals in the second degree, or aiders and abettors, in a former part of this work, will apply to the case of burglary; and make the breaking and entering by one the act of all the party engaged in the transaction, and legally present while the fact is committed. (b) So that if A., B., and C., go upon a common purpose and design to commit a burglary in the house of D., and A. only actually break and enter the house, B. stand near the door but do not enter, and C. stand at the lane's end, orchard gate, &c. to watch, this will be burglary in them all; and they are all in law principals. (c)

A breaking and entering by one, will be the act of the whole party engaged in the transaction.

Neither will the offence be the less the act of the party from his having effected the entry and the stealing by means of an infant under the age of discretion. Thus, if A., a man of full age, take a child of seven or eight years old, well instructed by him in the villainous art, as some such there are; and the child goes in at the window, takes goods out, and delivers them to A., who carries them away, this is burglary in A., though the child who made the entry, be not guilty by reason of his infancy. (d)

Entry and stealing effected by means of an infant.

II. The breaking and entering, which have been thus described, must take place in a *mansion*, or *dwelling-house*; which latter term is now generally adopted in indictments for burglary. And in treating of such mansion, or dwelling-house, it will be proper to enquire, first, as to what shall be \*so considered; secondly, how far it must be inhabited; and, thirdly, as to the person to be deemed the owner of it; for the ownership must be correctly stated in the indictment.

Of the mansion-house,

[\* 914]

Every house for the dwelling and habitation of man is taken to be a mansion-house in which burglary may be committed. (e) And a portion only of a building may come under this description. Thus where, upon an indictment for burglary, it appeared that the prosecutor rented only certain rooms of a house, namely, a shop and parlour, in which the burglary was committed, but that the owner did not inhabit any part of the house, and only occupied the cellar, it was holden that the shop and parlour were to be considered as the mansion-house of the prosecutor. (f) And

What shall be considered a mansion-house.

so ruled by Ward, Ch. B. Powis and Tracy, Js. and the Recorder; and they thought this the extremity of the law: and, on a subsequent conference with the other Judges, Holt, C. J. and Powell J. doubting, and inclining to another opinion, no judgment was given.

a 1 Hale 551. 4. Black. Com. 226.

b *Ante*, 30.

c 1 Hale 555.

d 1 Hale 555, 556.

e 3 Inst. 64.

f Roger's case, 1 Leach 89, 429. 2 East.

sets of chambers, in a college, or an inn of court, are to all purposes considered as distinct dwelling houses; being often held under distinct titles, and, in their nature and manner of occupation, as unconnected with each other, as if they were under separate roofs. (g) A loft, situated over a coach-house and stables, in a public mews, and converted into lodging rooms, has also been holden to be a dwelling-house. It appeared that the prosecutor, who was coachman to a lady, rented the rooms at a yearly rent; but that he had never paid any rent; and that the rooms were not rated in the parish books as dwelling houses, but as appurtenances to the coach-house and stables: that the way to the coach-house and stables was down a passage, out of the public mews, to a staircase which led to these rooms, and the entrance to which staircase was through a door, which was never fastened, but that there was a door at the top of the staircase to the rooms which was locked at night, and was [\* 915] broken by the prisoner. It was contended, on behalf of the prisoner, that these rooms, which probably were originally intended as mere hay-lofts, did not, in contemplation of law, form such mansions, or dwelling-houses, as to become the subject of burglary: but the objection was overruled by the court, who thought that the circumstance of these rooms being situated over the coach-house and stables would not alter the nature of the case; and that they were to all intents and purposes the habitation and domicile of the prosecutor and his family. (h) Burglary, however, cannot be committed by breaking into any inclosed ground, or any booth, or tent, erected in a market, or fair, though the owner may lodge therein; for the law regards thus highly nothing but permanent edifices; and the lodging of the owner in so frail a tenement no more makes it burglary to break it open than it would be to uncover a tilted waggon, in the same circumstances. (i)

**Buildings, outhouses, &c. parcel of the mansion-house.** The mansion-house not only includes the dwelling-house, but also the outhouses, such as warehouses, barns, stables, cowhouses, or dairy-houses, though not under the same roof, or joining contiguous to the dwelling-house, provided they are *parcel* thereof. (k) The material question, therefore, upon

P. C. c. 15. s. 19. The points respecting different mansions in the same house will be considered presently, in treating of the *ownership* of the mansion house.

g 1 Hale 522. 556. 1 Hawk. P. C. c. 38. s. 18. Evans and Fynche (case of). Cro. Car. 473. 4 Black. Com. 252. 2 East. P. C. c. 15. s. 17. p. 505.

h Turner's case, O. B. 1784, cor. Gould and Buller, Js.; and Perryn, B. 1 Leach 305. 2 East. P. C. c. 15. s. 9. p. 492. Mr. J. Buller did not give any opinion; but said he would save the case for the opinion of the

judges, who afterwards considered of the case, and were of opinion that this was a dwelling-house; and the prisoner, who had been acquitted of breaking and entering in the night time, had judgment for stealing to the value of forty shillings out of the dwelling-house.

i 1 Hale 557. 1 Hawk. P. C. c. 38. s. 35. 4 Black. Com. 226. As to robbing in any booth, or tent, in any fair, or market, see *post*, Chap. III.

k 3 Inst. 64. 1 Hale 558. Sum. 82. 1 Hawk. P. C. c. 38. s. 21. 4 Black. Com. 225.

this subject, respecting such outhouses, will be whether they are or are not *parcel* of the dwelling-house.

It is clear that any outhouse, within the curtilage, or same common fence, as the mansion itself, must be considered *\*as parcel* of the mansion; for the capital house protects and privileges all its branches and appurtenants, if within the curtilage, or homestall. (l) And though there be no common inclosure, or curtilage, yet, if the outhouses adjoin the dwelling-house, and be occupied as *parcel* thereof, they may still be considered as parts of the mansion. Thus, it was holden that the breaking and entering in the night time into a bakehouse, eight or nine yards distant from the dwelling-house, with only a pale reaching between them, was burglary. (m) And in a case where it appeared that the prosecutor, a farmer, had a dwelling-house, in which he lived, a stable, a cottage, a cowhouse, and barn, all in one range of building, in the order mentioned, and under one roof, but not inclosed by any wall or court-yard, and having no communication from either to the other within; and that the burglary charged was committed in the barn; the conviction of the prisoner was holden right by the judges, upon a conference, on the ground that the barn, which was under the same roof, was *parcel* of and enjoyed with the dwelling-house. (n) In this case the cottage was occupied by a servant of the prosecutor, who paid no rent; only an abatement was made in his wages, on account of his family being to reside in the cottage: and though the judges held (with the exception of Buller, J. who doubted) that this amounted only to a licence to the servant to lodge in the cottage, and not to a letting of it to him; yet, many of them inclined to the opinion that even if there had been a demise of the cottage to the servant, the barn would still have continued part of the prosecutor's dwelling-house, in point of law. (o)

Where the outhouse is at all separated from the dwelling-house, and not within the same curtilage, or common fence, it will not be protected by the mere circumstance of its being *\*in the occupation* of the owner of the dwelling-house; but in such case the fact of its being *parcel* of the dwelling-house, or not, is one which should be found by the jury upon the evidence submitted to them. Thus, where a special verdict stated that the prisoner broke and entered, in the night time, an outhouse in the possession of one George Shore, and occupied by him with his dwelling-house, and separated therefrom by an open passage, eight feet wide, with intent to commit a felony; and that the outhouse was not connected

Buildings, outhouses, &c. not *parcel* of the mansion-house.

[\* 917]

l 1 Hale 558, 9. 1 Hawk. P. C. c. 38. s. 25. 4 Black. Com. 225. 2 East. P. C. c. 15. s. 10. p. 493.

m Castle's case, 1 Hale 558. 1 Hawk. P. C. c. 38. s. 24.

n Brown's case, Newcastle Sum. Ass. 1787, cor. Wilson, J. 2 East. P. C. c. 15. s. 10. p. 493.

o 2 East. P. C. c. 15. s. 14. p. 502.



with the dwelling-house by any fence inclosing them both; the judges were unanimously of opinion that, from the manner in which the jury had found the facts, it was impossible to consider this outhouse as part of the dwelling-house; and that the jury should have found it parcel of the dwelling-house, if it were so. (*p*) Therefore, however near the outhouse may be to the dwelling-house, it will not be protected, unless it be parcel of the dwelling-house, and be so found; and if the outhouse be far remote from the dwelling-house, so as not reasonably to be esteemed parcel of it, as if it stand a bow-shot off, and not within or near the curtilage, it is clearly no part of the mansion-house, and the breaking of it is not burglary. (*q*)

**Eggington's case.** Held, that burglary could not be committed by breaking into a centre building, used for purposes of trade, but having no communication with the dwelling houses which formed the wings.

It was holden, in a modern case, that burglary could not be committed by breaking into a centre building, used for purposes of trade, but having no internal communication with the dwelling houses which formed the wings. The building was stated, in the first count of the indictment, as the dwelling-house of M. R. Boulton; in the second, as the dwelling-house of John Bush; and in the third, as the dwelling-house of William Nelson. It appeared, upon the evidence, that the place broken into was a centre building, having two wings; that in such centre building an extensive business was carried on, relating to different manufactories, in which one Matthew Boulton was concerned with M. R. Boulton, William Nelson, and several other persons; and \*also relating to two other manufactories, in which Matthew Boulton was concerned on his own account: that in part of one of the wings was the dwelling-house of M. R. Boulton; and in the other part of the same wing the dwelling-house of John Bush, mentioned in the second count of the indictment, who was a workman of Matthew Boulton's; but that neither of such dwelling-houses had any internal communication with the centre building, except only, in the one occupied by John Bush, a window which looked into a passage that ran the whole length of the centre building; and that in the other wing was the dwelling-house of William Nelson, which also had no internal communication with the centre building. It also appeared that in the front of this building there was a terrace or front yard, fenced round in different ways, and, at the end of the pile of building, by a wall, with gates for horses and carriages, and a door for foot passengers: that the prisoners entered by a door in the front yard, through which they went along the front of the building, and round it into another yard behind it, called the middle yard; from thence, through a door which had been left open, up a staircase in the centre building, where

*p* Garland's case. 1 Leach 144. 2 East. *q* 1 Hale 559. 1 Leach 144, note (*a*).  
P. C. c. 15. s. 10. p. 493.

they broke open some of the rooms; having so entered the premises, by the assistance of a servant of Matthew Boulton's, who acted as an accomplice for the purpose of effecting the apprehension of the prisoners. Upon this case being reserved for the consideration of the judges, they all agreed that the prisoners were not guilty of burglary; and the grounds upon which they so decided are stated to have been that the centre building, being a place for carrying on a variety of trades, and having no internal communication with the adjoining houses, could not be considered as part of any dwelling-house; and that it was not to be considered as under the same roof as the houses adjoining, though the roof of it had a connexion with the roofs of the houses. (r)

\* In some cases a part of a mansion-house may be so severed from the rest, by being let to a tenant, as to be no longer a place in which burglary can be committed. Thus, though a shop may be, and usually is, a parcel of the dwelling-house to which it is attached; yet if the owner of the dwelling-house let the shop to a tenant who occupies it by means of a different entrance from that belonging to the dwelling-house, and carries on his business in it, but never sleeps there, it is not a place in which burglary can be committed; for it is not parcel of the dwelling-house of the owner, who occupies the other part, being so severed by lease; nor is it the dwelling-house of the lessee, when neither he nor any of his family ever sleep there. (s) Though, if the lessee, or his servant, should usually or often lodge in the shop at night, it would then be the mansion or dwelling-house of such lessee, in which burglary might be committed. (t)

A case has been put, whether if the owner and occupier of a dwelling-house should let a part of it, namely, a chamber and a cellar, to a tenant, the only passage to the cellar being out of the street, and the cellar should be broken open in the night, it would be burglary: and it has been supposed that it would not, on the ground that the cellar must be considered as severed by the lease, and has no communication with the rest of the house. (u) Upon this, however, it has been justly observed, that the cellar would be no more severed from the house by the lease than the chamber, in which a burglary might be committed, and laid to be in the mansion of the owner and occupier of the dwelling-house, there being but one common entrance to him and the lodger. But it is admitted, that if the cellar alone were let, clearly no burglary could be committed in it. (x) And the doc-

[\* 919]  
A part of a house may be so severed from the rest as no longer to be a place in which burglary can be committed.

r *Exington and others* (case of), 2 Leach 913. 2 East. P. C. c. 15. s. 10. p. 494. 2 Bos. & Pul. 509.

t 1 Hale 557, 558. Kel. 83, 84. 4 Black.

Com. 225, 226. 2 East. P. C. c. 15. s. 20. p. 507.

u 1 Hale 558.

x Kel. 83, 84.

2 East. P. C. c. 15. s. 20. p. 507.

trine thus advanced, appears to be fully supported by the following case.

[\* 920]

Case of Gibson and others. A shop adjoining to a house, but let with some of the rooms of the house to a tenant, is still part of the dwelling-house if under the same roof and within the curtilage, although there be no internal communication, and although no person sleep in the shop. *Aliter*, if such shop be let by itself to a person who does not sleep therein.

\*One Thomas Smith was the owner of a house in which he resided himself, and to which there was a shop adjoining, built close to the house. There was no internal communication between the house and the shop; no person slept in the shop; and the only door to the shop was in the court-yard before the house and the shop; the court-yard being inclosed by a brick-wall, three feet high, including both the house and shop. Thomas Smith let the shop, together with some apartments in the house, to John Hill from year to year, at the yearly rent of six guineas. There was only one common door to the house, which communicated as well with the apartments reserved to himself by Smith, as with those which he let to Hill. In the brick wall, which included both the house and shop, next to the road, was a gate or wicket fastened by a latch, which served as a communication to both house and shop. The burglary was committed in the shop. Upon this evidence it was objected, by the counsel for the prisoners, that the shop could not be considered as the dwelling-house of Thomas Smith, as laid in the indictment; and in consequence of such objection the judgment upon the prisoners was respited until the point could be submitted to the twelve judges. The case was afterwards considered by them; and they were unanimously of opinion, that the indictment was well laid in describing the shop to be the dwelling-house of Smith, who inhabited in one part; and that the shop, being let with a part of the house inhabited by Hill, was still to be considered as part of the dwelling-house of Smith, being within the same building, under the same roof, and having only one door of communication; especially as it was within one curtilage or fence, although there was no internal communication between them. But it was admitted, that if the shop had been let by itself, Hill not living therein, burglary could not have been committed in it, for then it would have been severed from the house. (*y*)

[\* 921]

It seems that an out-house will not be prevented from being parcel of the dwelling-house by being holden under a distinct title.

It has been said, that if a man takes a lease of a dwelling-house \*from A. and of a barn from B., such barn would be no parcel of the dwelling-house, and not therefore a place in which burglary could be committed; (*z*) a position which would seem to lead to the inference, that no outhouse, holden under a distinct title from the dwelling-house, can be the subject of burglary. But upon this it has been observed, that the circumstance of an out-building being enjoyed by the occupier under a different title from his dwelling-house, seems a very unsatisfactory reason of itself for excluding it from the same protection, if it be within the curtilage, or

*y* Gibson, Mutton, and Wiggs, (case of,) 508. And see 2 Leach 918.  
1 Leach 357. 2 East. P. C. c. 15. s. 20. p. *z* 1 Hale 559.

under the same roof, and actually enjoyed as parcel of the dwelling-house in point of fact, and under such circumstances as would, apart from the difference of title, constitute it parcel of the mansion in point of law. (a)

The next question relating to the mansion-house is, how far it must be inhabited? Of the inhabitaney.

It appears to be well settled, that unless the owner has taken possession of the house by inhabiting it personally, or by some one of his family, it will not have become his dwelling-house in the proper meaning of the word, as applied to the offence of burglary. There are several cases to this effect, which sufficiently overrule any different opinions which may have been formerly entertained. (b) Cases where the owner has not begun to inhabit.

A Mr. Smith having purchased a house with an intention to reside in it, had moved into it some of his furniture and effects, to the value of about ten pounds; the house was put under the care of a carpenter for the purpose of being repaired; and Mr. Smith had not himself entered into the occupation of any part of it, nor did any part of his family, nor any person whatever, sleep therein. While the house was in this situation, it was broken open in the night-time; and, upon a case reserved for the consideration of the judges, they were of opinion that it could not be considered as a dwelling-house, being entirely uninhabited; and that therefore there could be no burglary. (c) Case of Lyons and Miller. [\* 922]

So where the tenant of a house, when the former tenant had quitted, put all his furniture into it, and frequently went thither in the day-time, but neither himself, nor any of his family, had ever slept there; it was ruled that burglary could not be committed therein. (d) Hallard's case.

And though persons sleep in a house thus situated; yet, if they are not of the family of the owner, it will still not be a dwelling-house in which burglary can be committed.

Thus, where the prisoner was indicted for a burglary in the dwelling-house of a Mr. Holland, and it appeared in evidence that the house was newly built and finished in every respect except the painting, glazing, and the flooring of one garret; that a workman, who was constantly employed by Fuller's case. [\* 923]

a 2 East. P. C. c. 15. s. 10. p. 494.

b In 1 Hawk. P. C. c. 38. s. 18. it is said that a house which one has hired to live in and brought part of his goods into, but has not yet lodged in, is one in which burglary may be committed. The point is mentioned in Kel. 46. but not as having been decided, *vide quare legem* being subjoined.

c Lyons and Miller (case of,) 1 Leach 185. The case is rather differently reported in 2 East. P. C. c. 15. s. 11. p. 496 where it is stated that no goods were in the house at the time it was broken open, and that the judges were therefore also of opinion that it was no burglary, because, as the indictment charged

an intent to steal, it must mean to steal the goods then and there being, and that, nothing being in the house, nothing could be stolen: but it is also further stated, that it seemed to be the sense of the judges, and Eyre, B. declared it to be his opinion, that although some goods might have been put into the house, yet, if neither the party nor any of his family had inhabited it, it would not be a mansion-house in which burglary could be committed.

d Hallard's case, cor. Buller, J. *Exeter*, Spr. Assiz. 1796. 2 East. P. C. c. 15. s. 12. p. 498. 2 Leach 701. note (a), and S. P. Thompson's case, cor. Grose, J. *Kingston Spr. Ass.* 1796, 2 East. *ibid.* 2 Leach 771.

Mr. Holland, slept in it for the purpose of protecting it, but that no part of Mr. Holland's domestic family had taken possession of it; the court held, that it was not the dwelling-house of Mr. Holland. (*e*)

Harris's  
case.

So in a case, where it appeared that the prosecutor had lately taken the house which was broken open; that he himself had never slept there, nor any of his family; but that on the night in which it was so broken, and for six nights before, he had procured two hair-dressers, who were not in any situation of servitude to him, to sleep there for the purpose of taking care of his goods and merchandize, which were deposited therein; the court was of opinion that the house could not, in contemplation of law, be considered as the dwelling-house of the prosecutor. (*f*)

Where the  
owner puts  
a person to  
sleep in the  
house at  
nights, till  
he can get  
a tenant.  
Davies's  
case.

Where the owner of the house has no intention of going to reside in it himself, and merely puts some person to sleep there at nights till he can get a tenant, the same rule is established; and the house, under such circumstances, cannot be considered as the dwelling-house of the owner.

[\* 924]

This point arose upon an indictment for stealing goods to the value of forty shillings in the *dwelling-house*. (*g*) Upon the evidence, it appeared that Mr. Pearce was a brewer living in Millbank-street, and owner of a public-house in Palace-yard, in which the offence was committed. The house was, at the time of the offence, shut up, and in the day time entirely uninhabited; but a servant of Mr. Pearce's was put to sleep in it at night, for the protection of the goods, until some other publican should take possession of it. There were in the house a number of beds, chairs, and other articles of furniture, which Mr. Pearce had purchased of the former tenant, with a view to accommodate the person \*to whom he might let it, but with no intention of residing in the house himself, either personally, or by means of any of his servants. The prisoner was found guilty of the whole charge stated in the indictment: but the point being saved for the opinion of the Judges, they were of opinion that the conviction, as to the capital part of it, was wrong; that as Mr. Pearce never intended to inhabit the house, it could not, in contemplation of law, be considered as his dwelling-house; and that it would have been no burglary if the house had been broken in the night. (*h*)

A house  
will not  
cease to be  
the dwell-

When the owner of the house has once entered upon the possession and occupation of it, by himself or by some of his family, it will not cease to be his dwelling-house on account

*e* Fuller's case, O. B. 1782, *cor.* the Recorder, 2 East. P. C. c. 15. s. 12. p. 498. 1 Leach 187.

*f* Harris's case, O. B. 1795, *cor.* the Recorder, 2 Leach 701. 2 East. P. C. c. 15. s. 12. p. 498.

*g* Under the provisions of 12 Anne, c. 7.

*h* Davies's, *alias* Silk's case, 2 Leach 876. 2 East. P. C. c. 15. s. 12. p. 499. The prisoner was in consequence recommended to mercy on condition of transportation, which might have been his punishment if he had been found guilty of simple larceny only.



of any occasional or temporary absence; even though no person be left in it. (i) Thus, if A. have a dwelling-house, and upon occasion he and all his family be absent for a night or more, burglary may be committed in their absence; and, so if A. have two mansion-houses, and be sometimes with his family at one, and sometimes at the other, the breach of one of them in the night time, in the absence of his family, will be burglary. (k) Also, if A. have a chamber in a college, or inn of court, where he usually lodges in term time; and, in his absence in the vacation, the chamber be broken open, the same rule will apply. (l)

ing-house of its owner, on account of his occasional or temporary absence.

The following case was decided in conformity with these principles. The owner of a house in Westminster, in which he dwelt, took a journey into Cornwall, with intent to return; and sent his wife and family out of town, and left the key with a friend to look after the house; and, after he had been gone a month, no person being in the house, it was broken open in the night, and robbed. A month afterwards, the owner returned with his family, and again inhabited there. This breaking was holden to be burglary. (m)

Case of Murray and Harris.

[\* 925]

But in cases of this kind, there must be an intention on the part of the owner to return to his house, *animus revertendi*; for if the owner has quitted without any intention of returning, the breaking of a house so left will not be burglary. (n)

But there must be *animus revertendi* in the order.

The prisoners were indicted for a burglary in the dwelling-house of a Mr. Fakney, and stealing divers goods. It appeared by Mr. Fakney's evidence, that he made use of the house in question, which was situated at Hackney, as a country-house, in the summer time, his chief residence being in London: that, about the end of the summer before the offence was committed, he removed with his whole family to London, and brought away a considerable part of his goods; and that in the November following his house was broken open, and in part rifled; upon which he removed the remainder of his household furniture, except a clock, and a few old bedsteads, and some lumber of very little value; leaving no bed or kitchen furniture, nor any thing else for the accommodation of a family. Being asked whether, at the time he so disfurnished his house, he had any intention of returning to reside there, he declared, that he had not come to any settled resolution, whether to return or not; but was rather inclined totally to quit the house, and to let it for the remainder of his term. The facts charged were sufficiently proved against the prisoners; but the court was of opinion, that the prosecutor having left his house, and

Nutbrown's case.

i Fost. 77. 1 Hale 556. 3 Inst. 64. 1 Bac. Ab. Burglary, (E.)

k 1 Hale 556. Sum. 82.

l *Id.* *Ibid.*

m Murray and Harris, (case of) O. B. 10.

W. 3. 2. East. P. C. c. 15. s. 11. p. 496, cited also in Fost. 77, from MS. Denton and Chapple, as a case upon a burglary in the house of Mr. Nicholls.

n Fost. 77. 4 Black. Com. 225.

[\* 926]

Inhabitan-  
cy merely  
casual, or  
for some  
particular  
purpose,  
will not be  
sufficient.

disfurnished it in the manner before mentioned, without any settled resolution of returning, but rather inclining to the contrary; the house could not, under these circumstances, \*be deemed his dwelling-house at the time the fact was committed; and accordingly directed the jury to acquit the prisoners of the burglary: which they did, but found them guilty of felony, in stealing the clock, &c. (o)

It seems that the mere casual use of a tenement as a lodging, or the using it only upon some particular occasions, will not be such an inhabitan-  
cy as will constitute it a dwelling-house in which burglary can be committed. (p) Thus, it was agreed by all the judges, that the fact of a servant having slept in a barn, on the night in which it was broken open, and for several nights before, he being put there for the purpose of watching thieves, made no sort of difference in the question, whether the offence was burglary or not. (q) And the circumstance of a porter lying in a warehouse, to watch goods, which is only for a particular purpose, does not make it a dwelling-house. (r) The question, therefore, respecting burglary in such barn or warehouse will remain, just as if no person had slept in them, to be disposed of by the principles which have been before discussed, as to their being or not being *parcel* of the mansion or dwelling-house. (s)

Qu. as to  
the case of  
an execu-  
tor putting  
servants  
into the  
house of  
his testa-  
tor, but not  
going to  
live there  
himself.

[\* 927]

A point of some nicety arises in the case of an executor putting servants into the house of his testator, but not going to live there himself. A case of this kind occurred, which is thus stated. A. died in his house, and B. his executor put servants into it, who lodged in it, and were on board wages; but B. never lodged there himself: and upon an indictment for burglary, the question was, whether this might be called the mansion house of B. The court *inclined* to think it might, *because the servants lived there.* (t) It was not necessary to \*decide the point in that case, as it turned out on the evidence that there was not a sufficient breaking of the house; and perhaps it would be difficult to reconcile the opinion to which the court is said to have inclined with some of the decided cases and principles upon this subject if the facts were that the executor did not contemplate any occupation of the house by himself, and that he merely put the servants there for the purpose of taking care of the house and furniture, till they should be properly disposed of according to his trust. (u)

o Nutbrown's (John and Miles) case, Fost. 76, 77.

p 2 East. P. C. c. 15. s. 11. p. 497.

q Brown's case, 2 East. P. C. c. 15. s. 11. p. 497. and s. 14. p. 502.

r Smith's case, M. 3 G. 1. by ten of the Judges, cited from Lord King's MS. 96. and

Serjeant Foster's MS. in 2 East. P. C. c. 15. s. 11. p. 497.

s *Ante*, 915. *et sequ.*

t Jones and Longman (case of) O. B. 1689, from Chapple's MS. 2 MS. Sum. 305, cited in 2 East. P. C. c. 15. s. 12. p. 499.

u See Davies's case, *ante* 923.

It remains further, in treating of the mansion, or dwelling-house, to enquire as to the person who is to be deemed the *owner* of it, in order to be able to state correctly in the indictment the name of the party in whose dwelling-house the burglary is alleged to have been committed.

Of the ownership of the mansion-house.

This subject is rather of a complicated nature: but, from the cases which have been hitherto decided, it seems that the material point to be ascertained will be, whether the ownership remains with the proper owner of the dwelling-house, and is exercised by him, either by his own occupation, or by that of other persons on his account; or whether the proper owner has given such an interest to other persons, in the whole or in parts of the dwelling-house, as to constitute an ownership in such other persons.

The owner of a dwelling-house may exercise his ownership by his own personal occupation, or by the occupation of any persons who by law are deemed to be part of his family. This doctrine has been carried to a great extent in the case of a wife. For where it appeared that a lady, whose house was robbed, had for many years lived separate from her husband; and that, when she was about to take the house, a lease of it was prepared in her husband's \*name, but that he refused to execute, and said he would have nothing to do with it, in consequence of which she agreed with the landlord herself, and had constantly paid the rent; it was holden upon an indictment for breaking open the house that it was well laid as the dwelling-house of the husband. (x) The reason given for this decision was, that whatever the wife has is the husband's in law: but, as that reason would not apply to a case where the law would adjudge the separate property of the mansion to be in the wife, and where she has also the exclusive possession; it seems that in such case the burglary ought to be laid as committed in her mansion-house, and not in that of her husband. (y)

Ownership, where the occupation is by persons who are part of the owner's family.

[\* 928]

The owner of a dwelling-house may also occupy it by means of servants. Thus, in a case which has been already mentioned, where the servant of a farmer, and his family, lived in a cottage adjoining his master's house, which he took to by agreement with his master, when he went into the service, but for which he paid no rent; only an abatement was made in his wages, on account of his family being to reside in the cottage; all the judges (with the exception of Buller, J. who doubted) held that this was no more than a licence to the servant to lodge in the cottage, and not a letting of it to him; and that the cottage, therefore, continued part of the mansion-house of the farmer. (z)

Ownership where the occupation is by means of the servants of the owner.

x Farre's case, Kel. 43, 44, 45.

y 2 East. P. C. c. 15. s. 16. p. 504.

z Brown's case, Newcastle Sum. Ass. 1787,

cor. Wilson, J. 2 East. P. C. c. 15. s. 14. p. 501, 502, ante 916. And see Bertie v. Beaumont, 16 East. 33.



Case of Stockton and Edwards. Where the servant of three partners in [\* 929] trade had weekly wages, and some rooms assigned to him for a lodging over the bank and brewery office of the partners, with which his lodging communicated by a trap-door and a ladder, it was holden that a burglary committed in the banking room was well laid as in the dwelling-house of the three partners.

[\* 930]

A recent case appears to have proceeded upon the same principle. The prisoners were indicted for a burglary in the dwelling-house of Messrs. Moore, Harrison, and Hamilton; and being convicted received sentence of death: but execution was respited, in order that the opinion of the judges might be taken upon the following facts. Messrs. Moore, Harrison, and Hamilton, the prosecutors, were \*partners in their business of bankers, and also in a brewery concern; and were the owners of the house in question. The lower rooms of the house were three in number, having only one entrance from without, by a door opening to the street; which was the door broken open to commit the felony. It opened into one of the three rooms in which the clerk's business relating to the brewery was transacted: that room communicated by a door-way with an inner room, where the banking business was done, and where the cash, notes, &c. were deposited: and the inner room communicated in the same manner with a further room, which was the private room of the partners. And the business of Messrs. Moore and Co. was transacted only in these lower rooms of the house, in which no person slept. When the entrance door which opened to the street was locked up at night, upon leaving the offices, the clerk who had the custody of the key left it in the care of one John Stevenson, who inhabited the upper rooms of the house, from whom it was received again, when the offices were to be opened in the morning. This John Stevenson was a servant to Messrs. Moore and Co. in their brewery business, as their cooper, at weekly wages, with firing and lodging for himself and his family: but the contract as to the lodging was not, in general terms, that he should be provided with lodging, but that he should have the particular rooms which he inhabited for the lodging of himself and his family. There was a separate entrance to these rooms from without; they were not in any way used for the business which was carried on in the lower rooms, some papers only of no consequence being kept in them by Messrs. Moore and Co.; and the only communication between the upper rooms and the lower ones was by a trap-door in the floor of one of the upper rooms and a ladder. Since the robbery this trap-door and ladder had been constantly used, in order to go down to the lower rooms, and bolt the street door of the offices in the inside, for better security; but none of the witnesses knew of their having ever been used for any purpose previous to the robbery, although they might have \*been so used at any time, as the trap-door was never kept locked or fastened, and the key of it was left in Stevenson's custody. There were six windows in the upper rooms, which were assessed in the name of Stevenson; but the duty was paid by Messrs. Moore and Co. The lower rooms had nine windows; but were not charged with any window tax, the assess-

sors not considering them as inhabited. Upon these facts, two questions were submitted: first, whether this inhabitancy could be considered as the inhabitancy of Messrs. Moore and Co. by their servant Stevenson, or whether Stevenson, by the contract, became tenant, and the upper part of the house was his dwelling-house, and not that of Messrs. Moore and Co.; and, secondly, if these premises were the dwelling-house of Messrs. Moore and Co., the further question arose, whether there was such a severance of the lower part, as to prevent its being included as part of their dwelling-house.

After hearing the argument on behalf of the prisoners, Lord Ellenborough, C. J. said, "Could Stevenson have maintained trespass against his employers for entering these rooms? or if a man assigns to his coachman the rooms over his stable, does he thereby make him a tenant? Whether the assessors formed a right or a wrong judgment, can make no difference: nor is it material to which trade Stevenson was a servant, for the property in both partnerships belonged to the same persons. As to the severance, the key of the trap-door was left with Stevenson, and the door was never fastened; and it can make no difference, whether the communication between the rooms was through a trap-door, or by a common staircase." And Mansfield, C. J. also said, "Many persons have houses given them to live in, as porters at park-gates: If a master turns away his servant, does it follow that he cannot evict him till the end of the year? Could not the prosecutors have turned out this man when they would?" (a)

"The same rule, of the occupation of the servant being that of the master, will hold with respect to all persons standing in the relation of servants. Therefore, apartments in the king's palaces, or in the houses of noblemen, for their stewards and chief servants, must be laid as the mansion-house of the king or nobleman. (b) Accordingly, where three persons were charged with having broken into the lodgings of Sir H. Hungate, at Whitehall, it was agreed that the indictment should be for breaking the King's mansion, called Whitehall. (c) So, where a man was indicted for breaking into a chamber in Somerset-house, and the indictment charged it to be the mansion-house of the person who lodged in it, it was agreed that the whole house belonged to the queen-mother, and therefore that the indictment was bad. (d) And where a house at Chelsea was broken into, which was used for an office under government, called the Invalid Office, and the rent and taxes of which were paid by government; it was holden that the indictment was defective in laying it to be

[\* 931]

Ownership of apartments in palaces, noblemen's houses, or in the houses of a public company.

a Stockton and Edwards (case of) 2 Taunt. 339. 2 Leach 1015. The judges did not afterwards pronounce any further opinion; but the prisoners were executed according to their sentence.

b 1 Hale 556, 557. 2 East. P. C. c. 15, s. 14. p. 500.

c Williams and others (case of,) 1 Hale 522.

d Burgess's case, Kel. 27.

the house of a person who occupied the whole of the upper part of it. (e) An indictment also for a burglary in the dwelling-house of the *East India Company* was holden to be good, the house being inhabited by the servants of that company. (f) And where an indictment charged a burglary in breaking into the mansion-house of the master, fellows, and scholars of Bennet College, in Cambridge; the fact being that the prisoner broke into the buttery of the college; all the judges, upon reference to them, held that it was burglary. (g)

[\* 932]

Ann Hawkins's case.

\*The following case also appears to have proceeded upon the same principle, that burglary in the apartments of officers of a public company must be laid as committed in the mansion-house of the company. The prisoner was indicted for breaking the mansion-house of Samuel Story, in the night-time. It appeared on the evidence that the house belonged to the *African Company*; that Story was an officer of the company; that he and many other persons, as officers of the company, had separate apartments in the house, in which they inhabited and lodged; and that the apartment of Story was that which was broken open. It was holden that the apartment of Story could not be called his mansion-house, because he and the others inhabited the house merely as officers and servants of the company. (h)

Ownership, where the house was occupied by the agent of a trading company, for the purpose of their trade.

Case of Margetts and others.

But this rule has been holden not to extend to the case of a house occupied by the *agent of a trading company*; though he resided in it, with his family, only for the purpose of conducting their trade, and the lease of the house was held and the rent and taxes for it paid by the company; and an indictment was holden to be good, which stated the burglary as being committed in the dwelling-house of such agent.

In this case the agent, a Mr. Sylvester, kept a blanket warehouse in Goswell-street; and resided, together with his wife and children, in the house over the warehouse. The warehouse was on the ground floor, and consisted of four rooms, the second of which was the room that was broken into; and there was an internal door from the warehouse to the dwelling-house. All the blankets were the property of Mr. William Sellman and others, a company of blanket

[\* 933]

\*manufacturers, consisting of sixty or more, at Whitney, in Oxfordshire, none of whom ever slept in the house. The lease of the premises was in the company, and the whole rent of both dwelling-house and warehouse was paid by them.

e Peyton's case, O. B. 1784, 1 Leach 324. In 1 Bac. Abr. *Burglary*. (E.,) in the notes, there is a Qu. in whose house stealing in the Invalid Office at Chelsea should be laid to be.

f Picket's case, O. B. 1765, 2 East. P. C. c. 15. s. 14. p. 501.

g Maynard's case, *Cambridge Spr. Ass.* 1774, 2 East. P. C. c. 15. s. 14. p. 501.

h Hawkins's (Anne) case, cor. Holt, C. J., Tracy, J., and Bury, B. O. B. 1704, Fost. 38,

39. The case is cited from Mr. J. Tracy's MS. from which it appears that the jury was discharged of the indictment laying the breaking to be in the mansion-house of Samuel Story; and that it was amended by laying the breaking in the mansion-house of the company. Mr. J. Foster says that this report is warranted in the substantial parts of it by the record. Fost. 39.

Sylvester acted as their servant or agent, and received a consideration for his services from them, part of which consideration, he said, was his being permitted to live in the house rent free; and the lease of the premises was in the company. The commission of the offence being clearly proved, it was contended, by the counsel for the prisoners, on the authority of Hawkins's case, that this must be considered as the dwelling-house of the company, and ought to have been so charged in the indictment, and not as the house of Sylvester, who inhabited it merely for them, and as their servant. But the court is said to have been clearly of opinion that it was rightly charged to be the dwelling-house of Sylvester; and that although the lease of the house was held, and the whole rent paid by the company in the country, yet as they had never used it in any way as their habitation, it would be doing an equal violence to language and to common sense, to consider it as their dwelling-house, especially as it was evident, that their only purpose in holding it was to furnish a dwelling to their agent, and ware-rooms for the commodities therein deposited. That the dwelling so furnished was a mean by which they in part remunerated Sylvester for his agency, and precisely the same thing as if they had paid him as much more as the rent would amount to, and he had paid the rent; but that the company in this case preferred paying the rent of the whole premises, and giving their agent and his family a dwelling therein, towards the salary which he was to receive from them. And that the house was therefore essentially and truly the dwelling-house of the person by whom it was occupied. (i)

\*Where persons are abiding in a house as guests, or by sufferance, or otherwise, having no fixed or certain interest in any part of it, and a burglary is committed in any of their apartments, the indictment should lay the offence as in the mansion of the proprietor of the house. (k) So that if the chamber of a guest at an inn be broken open, it must be laid

[\* 934]  
Ownership  
of apart-  
ments oc-  
cupied by  
guests, &c.  
in a house  
or inn.

i Margetts and others, (case of) O. B. 1301, cor. Graham, B. and Grose, J., 2 Leach 930. It is also stated, in the report of this case, that the court further gave as a reason for their judgment, that "the punishment of burglary was intended to protect the *actual occupant* from the terror of disturbance during the hours of darkness and repose, but that it would be absurd to suppose that the terror, which is of the essence of this crime, could, from the breaking and entering in this case, have produced an effect at Whitney, in Oxfordshire." But the accuracy of this reasoning may perhaps be questionable. The punishment of burglary will attach equally, and the actual occupant will not be less protected, though the offence should be laid in the indictment as committed in the dwelling-house of the real owner. And with respect to the

terror in this case not having affected the company at Whitney, the same might have been said of the terror to the East India Company, or the African Company, in the cases of burglaries in their houses, which have been before-mentioned, *ante*, 931. There is a note to this case of Margetts and others, which states that Grose, J. asked whether there had not been a prosecution at the Old Bailey for a burglary in some of the halls of the city of London, in which it was clear that no part of the corporation resided, but in which the clerks of the company generally lived; and that Mr. Knapp informed the court, that his father was clerk to the Haberdashers' Company, and resided in the hall which was broken open; and in that case the court held it to be his father's house.

k 1 Hawk. P. C. c. 38. s. 26.

in the indictment to be the mansion-house of the inn-keeper. (*l*) It is indeed said, that if A., a lodger in an inn, goes to his chamber to bed, and his door is latched or locked, and afterwards in the night he rises, opens his chamber-door, steals goods in the house, and goes away, it may be a question whether this be a burglary; and it is also said, that it seems it would not, because A. had a kind of special interest and property in his chamber, and therefore that the opening of his own door was no breaking of the innkeeper's house. (*m*) But though this is the inclination of the opinion of a very

[\* 935] great lawyer, the foundation on which it \*proceeds cannot easily be reconciled with the doctrine which he admits in the same page, and also in a subsequent part of his work, namely, that if A. had opened the chamber of B., another lodger in the inn, to steal his goods, it would have been burglary; and that though a lodger has a special interest in his chamber, yet a burglary committed in it must be laid as in the mansion-house of the innkeeper. (*n*) And it has been remarked, that this doctrine is also at variance with the reasoning, in a case subsequently decided, which supposes that a guest has not even the possession of a room in an inn for himself, but that it remains still in the possession of the host. (*o*)

Prosser's case. Where the prisoner, under pretence of being robbed, had forced open in the night the chamber-door of a guest in an inn, and stolen his goods; held, that the burglary should have been laid in the dwelling-house of the innkeeper, and not of the guest.

[\* 936]

In this last-mentioned case the prosecutor, who was a Jew pedlar, came to a public-house to stay all night, and fastened the door of his bed-chamber; when the prisoner, pretending to the landlord that the prosecutor had stolen his goods, under this pretence, with the assistance of the landlord and others, forced open the chamber door with intent to steal the goods mentioned in the indictment; and the prisoner accordingly stole them. These facts were found specially. Mr. Baron Adams who tried the prisoner, doubting whether the bed-chamber could properly be called the dwelling-house of the prosecutor, as stated in the indictment, the case was submitted to the consideration of the Judges. They all thought, that though the prosecutor had for that night a special interest in the bed-chamber, yet that it was merely for a particular purpose, namely, to sleep there that night as a travelling guest, and not as a regular lodger; that he had no *certain* and *permanent* interest in the room itself, but that both the property and the possession of the room remained in the landlord, who would be answerable *civiliter* for any goods of his guest that were stolen in \*that room, even for the goods then in question, which he could not be, unless the room were deemed to be in his possession. They thought also, that the landlord might have gone into the room when he pleased, and

*l* 1 Hale 557.

*m* *Ibid.* 554.

*n* 1 Hale 554, 557.

*o* 2 East. P. C. c. 15. s. 15. p. 503. where

the learned writer says, that this deserves to be well weighed before any final resolution upon the point.



would not have been a trespasser to the guest: and that, upon the whole, the indictment was insufficient. (*p*)

The landlord in this case does not appear to have been privy to the felonious intent of the prisoner; but, on the contrary, was imposed upon by him, and induced to assist in breaking open the chamber, upon the supposition that the guest within it had been guilty of felony: but even if the landlord had been an accomplice in the act of the prisoner, it seems that his offence would not have been burglary; for though it has been said that if the host of an inn break the chamber of his guest in the night to rob him it is burglary, (*q*) that doctrine is questioned; and it is well observed, that there seems to be no distinction between that case and the case of an owner residing in the same house, breaking the chamber of an inmate having the same outer door as himself; which would not be burglary. (*r*)

Though different opinions appear to have been formerly entertained upon the point, whether in the case of burglary in the hired apartment of an inmate it should be laid to be committed in the mansion-house of the inmate or of the owner; (*s*) it is now settled, that if the owner who lets out apartments in his house to other persons sleeps under the same roof, and has but one outer-door at which he and his lodgers enter, all the apartments of such lodgers are parcel of the one dwelling-house of the owner; but, that if the owner does not himself dwell in the same house, or if he and his lodgers enter by different outer doors, the apartments so let out are the mansion, for the time being, of each lodger respectively. (*t*)

The ownership of apartments let out to inmates depends upon whether the owner sleeps under the same roof, and whether there is [\* 937] but one outer door.

The following cases were decided in conformity to this rule. A burglary was committed in a house which belonged to one Nash, who did not live in any part of it himself, but let the whole of it out in separate lodgings from week to week: and an inmate named Jordan had two apartments in the house; namely, a sleeping-room upon one pair of stairs, and a workshop in the garret; which he rented by the week as tenant at will to Nash. The workshop was the room broken open by the prisoner. And upon a case re-

Carrell's case.

*p* Prosser's case, *cor.* Adams B. *Monmouth* Sum. Ass. 1763. 2 East. P. C. c. 15. s. 15. p. 502, 503.

*q* Dalt. c. 151. s. 4.

*r* 2 East. P. C. c. 15. s. 15. p. 502. Kel. 81.

*s* 1 Hale 556. Kel. 83, 84. 1 Hawk. P. C. c. 58. s. 27. 1 Bac. Ab. *Burglary*, (*E*) notes.

*t* 4 Black. Com. 225. Lee v. Gansel, Cowp. 8. 2 East. P. C. c. 15. s. 18. p. 503. adopting the doctrine in Kel. 83, 84. And in Rogers's case, 1 Leach 90, is the following note by the editor:—"I have been favoured with the following opinion of Lord C. J. Holt upon this subject, from the manuscript notes of the late Lord C. B. Parker.—If inmates

have several rooms in a house, or which rooms they keep the keys, and inhabit them severally with their families, yet, if they enter into the house at one outer door with the owner, these rooms cannot be said to be the dwelling-houses of the inmates, but the indictment ought to be for breaking the house of the owner. *McC. Tanner*, an ancient clerk of the court, said, that the constant opinion and practice had been according to the opinion of Lord C. J. Kelynge, which opinion was cited by Lord C. J. Holt upon this occasion at the Old Bailey October Session, 1701."

Trapshaw's case.

[\* 938]

ferred to the Judges for their consideration, whether the indictment had properly charged the burglary in the dwelling-house of Jordan, ten of them were of opinion, that as Nash, the owner of the house, did not inhabit any part of it, the indictment was good. (u) So upon an indictment on the \*statute 3 and 4 W. and M. c. 9. for robbery in a dwelling-house, where it appeared that the house was situated in a mews, and the whole of it let out in lodgings to three families, with only one outer door, which was common to all the inmates; one of whom rented the parlour on the ground-floor, and a single room up one pair of stairs: and that the parlour on the ground floor was the part of the house broken open; all the judges held that the offence was well laid in the indictment, as having been committed in the dwelling-house of the particular inmate. (x)

Rogers's case.

Consistently also with this rule, an occupation of some part of the house by the owner, which does not amount to an inhabiting, will not make the house such as may be stated to be his dwelling-house in an indictment for burglary. The owner of a house let the whole of it in apartments to different persons, and did not inhabit any part himself. One of the inmates rented the bottom part of the house, namely, a shop, a parlour, and a cellar, (which ran underneath the shop and parlour,) at a yearly rent; but the owner had taken back the cellar for the purpose of keeping wood and lumber in it, and made an allowance to the inmate of ten shillings a year, which was deducted from the rent. The entrance to the house was by a common outer door from the street. The shop and parlour were broken open. And upon an indictment for burglary, laying the offence to have been committed in the dwelling-house of the inmate, nine of the judges agreed that this was proper; that it could not have been laid to be the dwelling-house of the owner, as he did not inhabit any part of it, but only occupied the cellar: but that it would have been otherwise if the owner had occupied any part of the house. (y)

Ownership where

[\* 939] there is an actual severance,

Where there is an actual severance of a house in fact, by \*a partition or the like, all internal communication being cut off, and each part being inhabited by several occupants, separate and distinct mansions in law will be constituted. (z) And this may be, though the rent and taxes of the whole

(u) Carrell's case, O. B. 1782, considered of by the judges, E. T. 1782. 1 Hawk. P. C. c. 38. s. 32. 1 Leach 237. 2 East. P. C. c. 15. s. 18. p. 506. The judges relied on Rogers's case, 1 Leach 90. *ante* note (t) and *post*. 938. The two other judges (Eyre, B. and Buller, J.) who thought that it was not the mansion house of Jordan, were of opinion that it might have been laid to have been the mansion-house of Nash; to which some of

the other judges inclined if it were not the mansion of Jordan.

x Trapshaw's case, O. B. 1786, and Hil. T. 1787. 1 Hawk. P. C. c. 33. s. 30. 1 Leach 427. 2 East. P. C. c. 15. s. 18. p. 506.

y Rogers's case, O. B. 1772. and Mich. T. 1772. 1 Hawk. P. C. c. 33. s. 29. 1 Leach 89. 2 East. P. C. c. 15. s. 19. p. 506, 507.

z 2 East. P. C. c. 15. s. 17. p. 504.

premises be paid jointly out of the partnership fund of the several occupants.

The prisoner was indicted for burglary and larceny in the dwelling-house of Thomas Smith and John Knowles. It appeared that these persons were in partnership, and lived next door to each other. The two houses had formerly been one house only, but had been divided for the purpose of accommodating the respective families of each partner, and were then perfectly distinct and separated from each other, there being no communication from the one to the other, without going into the street. The house-keeping, servants' wages, &c. were paid by each partner respectively; but the rent and taxes of both the houses were paid jointly out of the partnership fund. The prisoner was servant to Smith, and it was in his house that the burglary was committed. It was objected upon these facts, that although the two houses were the joint property of both the partners, yet they were the separate and respective mansions of each, and therefore that the burglary ought to have been laid as committed in the house of Smith only. And the court conceived the objection to be well founded, and directed the jury to acquit the prisoner of the capital part of the charge. (a)

\*In a more recent case also it appears to have been ruled that a contribution by one of two partners of a proportion of the rent and taxes, for certain premises used in the partnership concern, did not give him such a joint possession of those premises as to make it necessary to state them in the indictment as the dwelling-house of both the partners. The indictment was for stealing in the dwelling-house of James Moreland; and the evidence was, that Moreland and one Gutteridge were co-partners; that Moreland was the lessee of the whole premises, and paid all the rent and taxes for them; and that Gutteridge had an apartment in the house, and allowed Moreland a certain sum for board and lodging, and also a certain proportion of the rent and taxes for the shop and warehouses. The felony was committed in the shop. It was contended, that Gutteridge under these circumstances had a joint possession of the shop and warehouses, and that the indictment should have been framed accordingly; but the point being saved upon this objection for the consideration of the judges, they were of opinion that the indictment was right. (b)

and an internal communication.

Jones's case. Several occupations of the same house by two partners may constitute distinct mansions for each partner, though the rent and taxes be paid from the joint fund.

[\* 940]

Partner's case

a Jones's (Marion) case, 1 Hawk. P. C. c. 34, s. 34. 1 Leach 537. 2 East, P. C. c. 35, s. 17, p. 504. In Treacy v. Talbot, 2 Bask. 512, (a case upon a distress for a poor's rate) it was ruled by Holt, C. J. that if two several houses are inhabited by several families who make and have but one common entrance or entrance for both, yet, in respect of their originality, both houses continue rateable severally, for they were at first separate

houses; and if one family goes, one house is vacant. But if one tenement be divided by a partition, and inhabited by different families, namely, the owner in one and a stranger in another, these are several tenements, severally rateable while they are thus severally inhabited; but, if the stranger and his family go away, it becomes one tenement.

b Patminter's case, 1 Leach 537 note (a.)



Owner of a house breaking open the apartments of his lodgers will not be guilty of burglary.

As, according to the rule which has been stated as now established upon this subject, where the owner of a house lets out apartments in it to lodgers, but continues to inhabit some part of the house himself, and has but one outer door common to him and his lodgers, such apartments must be considered as parcel of his dwelling house; (c) it will be a necessary consequence that if he should break open the apartments of his lodgers in the night and steal their goods, the offence will not be burglary; on the ground that a man cannot commit burglary by breaking open his own house. (d)

[\* 941] Of the time at which the offence must be committed, namely, the night.

III. The definition of burglary now leads us to the\* *time* at which the offence must be committed. This time must be the *night*; for in the day-time there can be no burglary. (e) It appears that anciently the day was accounted to begin only at sun-rising, and to end immediately upon sun set; but it is now settled as the better opinion that if there be daylight or twilight enough begun or left whereby the countenance of a person may be reasonably discerned, it is no burglary. (f) But this does not extend to moon-light; for then midnight house-breaking might be no burglary. (g) Besides, the malignity of the offence does not so properly arise from its being done in the dark, as *at the dead of night*; when all the creation, except beasts of prey, are at rest; when sleep has disarmed the owner, and rendered his castle defenceless. (h)

The breaking and entering need not be both in the same night.

The breaking and entering need not be both done in the same night: for if thieves break a hole in a house one night, with intent to enter another night and commit felony, and come accordingly another night and commit a felony through the hole they so made the night before, this seems to be burglary; for the breaking and entering were both *noctanter*, though not the same night. (i) It is said, however, that if the breaking be in the day-time and the entering in the night, or the breaking in the night and entering in the day, it will not be burglary. (k) But upon this position it has been remarked that the authority upon which it appears to have proceeded (l) does not fully prove the point for which it is cited, but only furnishes a resolution to the effect that if thieves enter in by night at a hole in the wall, which was there before, it is not burglary. without stating who made the hole, and of course not coming\* up to the case of a hole made by thieves themselves in the day-time, with intent to enter more

[\* 942]

c *Ante*, 936.  
d 2 East. P. C. c. 15. s. 18. p. 506. *Ante*, 936. Such offence therefore would only be felony.

e 4 Black. Com. 224.  
f 3 Inst. 63. 1 Hale 550, 551. Sum. 79.  
1 Hawk. P. C. c. 38. s. 2. 1 Bac. Ab. *Burglary* (D.) 4 Black. Com. 224. 2 East.

P. C. c. 15. s. 21. p. 509.

g 1 Hale 551.

h 4 Black. Com. 224.

i 1 Hale 551. 4 Black. Com. 226. *Ante*, 913.

k 1 Hale 551.

l Crompt. 33 a et 8 Ed. IV. cited by Lord Hale 551.

securely at night. (m) And it is observable that it is elsewhere given as a reason why the breaking and entering, if both in the night, need not be both in the same night, that it shall be supposed that the thieves brake and entered in the night when they entered, for that the breaking makes not the burglary till the entry; (n) which reasoning, if applied to a breaking in the day-time and an entering in the night, would seem to refer the whole transaction to the entry, and make such breaking and entering also a burglary.

IV.—The last part of the definition of burglary relates to the intent. The act of breaking and entering the mansion-house in the night must be done “with intent to commit some felony within the same, whether such felonious intent be executed or not.” (o)

Of the intent to commit a felony.

If the intention of the entry be either laid in the indictment, or appear upon the evidence, to have been only for the purpose of committing a trespass, the offence will not be burglary. Therefore, an intention to beat a person in the house will not be sufficient to sustain the indictment; for though killing or murder may be the consequence of beating, yet if the primary intention were not to kill, the intention of beating will not make burglary. (p) The entry must be for a felonious purpose. (q) It should however be observed, that if a felony be actually committed, the act will be *prima facie* pregnant evidence of an intent to commit it; and it is a general rule, that a man who commits one sort of felony in attempting to commit another, cannot excuse himself upon the ground that he did not intend the commission\* of that particular offence. (r) But it seems that this must be confined to cases where the offence intended is in itself a felony. (s)

An intent to commit a trespass will not be sufficient.

[\* 943]

The prisoner was indicted for burglary, in breaking and entering the stable of one James Bayley, part of his dwelling-house, in the night, with a felonious intent to kill and destroy a gelding of one A. B. there being. The facts were, that the gelding was to have run for forty guineas, and that the prisoner cut the sinews of his fore leg to prevent his running, in consequence of which he died. Parker, Ch. B. before whom the prisoner was tried, ordered him to be acquitted, on the ground that his intention was not to commit the felony by killing and destroying the horse, but a trespass only to prevent his running; and that therefore no burglary. (t)

Dobbs's case.

m Note (k) to 1 Hale 551. (ed. 1800) 2 East. P. C. c. 15. s. 21. p. 509.

n 1 Hale 551.

o *Ante* 900.

p 1 Hale 561.

q 3 Inst. 65. 1 Hale 559, 561. Sum. 83. Kel. 47. 1 Hawk. P. C. c. 38. s. 36. 1 Bac. Ab. *Burglary* (F.) 4 Black. Com. 227.

r 1 Hale 560. 2 East. P. C. c. 15. s. 22. p. 509. s. 25. p. 514, 515. Kel. 47.

s 2 East. P. C. c. 15. s. 25. p. 515.

t Dobbs's case, *cor.* Parker, Ch. B. *Buckingham* Sum. Ass. 1770, 2 East. P. C. c. 15. s. 25. p. 513. But it appears that the prisoner was again indicted for killing the horse, and capitally convicted. *Id. ibid.*

Dingley's  
case.

The prisoner, being a servant or journeyman to one John Fuller, was employed to sell goods, and receive the money for his master's use. In the course of the trade he sold a large parcel of goods, for which he received a hundred and sixty guineas, none of which he put into the till, nor in any way gave into his master's possession; but deposited ten guineas of the sum in a private place in the chamber where he slept, and carried off the remaining hundred and fifty on leaving his service, from which he decamped before the embezzlement was discovered. He left a trunk containing some of his clothes, as well as the ten guineas, behind him; but afterwards in the night time broke open his master's house, and took away with him the ten guineas which he had so deposited in the private place in his bed-chamber. This was held to be no burglary, because the taking of the money was no felony; for although it was the master's money\* in right, it was the servant's money in possession, and the original act was no felony. (u)

[\* 944]

Case of  
Knight and  
Roffey.

In another case also, the decision proceeded upon the same ground, namely, that the intention was not to commit a felony. The prisoners were indicted for a burglary in the dwelling-house of Mary Snelling, the intent being laid to steal the goods of one Leonard Hawkins. It appeared that Hawkins, who was an excise officer, had seized some bags of tea in a shop entered in the name of Smith, as being there without a legal permit; and had removed them to Mary Snelling's, where he lodged. The prisoners and many other persons broke open Mary Snelling's house in the night, with intent to take this tea. It was not proved that Smith was in company with them; but the witnesses said, that they supposed the tea to belong to Smith; and supposed that the fact was committed either in company with him, or by his procurement. The jury, being directed to find as a fact with what intent the prisoners broke and entered the house, found that they intended to take the goods on the behalf of Smith; and, upon the point being reserved, all the Judges were of opinion that the indictment was not supported; as, however outrageous the conduct of the prisoners was, in so endeavouring to get back Smith's goods, still there was no intention to steal. (x)

u Dingley's case, cited by Const. *arguendo* in Bazeley's case, 2 Leach 840, 841. where he mentions it as cited by Sir B. Shower, in his argument in the case of Rex v. Meers, 1 Show. 53. and there said to be reported by Gouldsborough 186. Mr. Const further said, that he had been favoured with a manuscript report of it, extracted from a collection of cases in the possession of the late Mr. Reynolds, clerk of the arraigns at the Old Bailey, under the title of Rex v. Dingley, by which it appeared that the special verdict was found

at the Easter Sessions, 1687, and argued in the King's Bench in Hil. T. 3 Jac. II. and in which it was said to have been determined that this offence was not burglary, but trespass only. See the case cited also as Rex v. Dingley, 1 Hawk. P. C. c. 38. s. 37. and as a case Anon. in 2 East. P. C. c. 15. s. 22. p. 510.

x Rex v. Knight and Roffey, East T. 1782. 2 East. P. C. c. 15. s. 22. p. 510. Some of the Judges held, that if the indictment had been for breaking the house with intent feloniously to rescue goods seized, &c. which was made

\*It is quite clear, therefore, that the entry must be with a *felonious intent*. And it seems also to be now well established, contrary to some opinions which have been formerly entertained upon the point, (y) that it makes no difference whether the offence intended were felony at common law, or only created so by statute; and the reason given for the better opinion is this, that whenever a statute makes any offence felony, it incidentally gives it all the properties of a felony at common law. (z)

The felony intended may be either felony at common law or by statute.

It is necessary to ascertain with exactness the felony really intended, as it must be laid in the indictment, and proved, agreeably to the fact. And a felony intended to be committed will not support an indictment charging a felony actually committed. Thus where, upon an indictment for burglary and stealing goods, it has appeared that there were no goods stolen, but that the burglary was with intent to steal; it has been holden that the indictment was not supported by the evidence. (a) So, if it be alleged, that the entry was with intent to commit one sort of felony, and it appears upon the facts that it was with intent to commit another; it will not be sufficient. (b) And where the charge \*is of a felony intended to be committed by stealing goods, the property in the goods must be correctly stated. Thus, where an indictment charged a burglary in the house of one Joseph Davis, with intent to steal the goods of the said Joseph Wakelin; and it appeared that no such person as Joseph Wakelin had any property in the house, but that in fact the name *Wakelin* had been inserted by mistake in the indictment instead of *Davis*, though Lawrence J. before whom the prisoner was tried, inclined to think that the mistake was not material *as to the burglary*, a majority of the Judges were afterwards of opinion (the point being saved for their consideration), that in an indictment of this description it was necessary to shew to whom the property belonged, in order to render the charge complete; and that the words "*of the said Joseph Wakelin*," being material, could not be rejected as surplusage. (c)

The felony really intended must be stated correctly, and proved according to the fact.

[\* 946]

But if the indictment charge a burglary with intent to

felony by 19 Geo. II. c. 34. (many provisions of which are now repealed, see *ante*, 166.) it would have been burglary. But they agreed, that even in that case some evidence would have been necessary on the part of the prosecutor as to the goods being uncustomed, in order to throw the proof that the duty was paid on the prisoners: but that the goods being found in oil cases, or in great quantities in an unentered place, would have been sufficient for that purpose. As to the latter point, see *ante*, 185.

y 1 Hale 562. Crompt. 32. 2 East. P. C. c. 15. s. 22. p. 511.

z 1 Hawk. P. C. c. 38. s. 38. 4 Black. Com. 228. 1 Bac. Ab. *Burglary* (F.) 2 East.

P. C. c. 15. s. 22. p. 511. *Rex v. Locost and Villars*, Kel. 30. *Rex v. Gray*, 1 Str. 481. *Rex v. Knight and Roffey*, *ante*, note (x.)

a 2 East. P. C. c. 15. s. 25. p. 514. *Vandercomb and Abbott* (case of,) 2 Leach 717.

b 2 East. P. C. c. 15. s. 25. p. 514.

c *Jenks's case*, O. B. 1796, *cor. Macdonald*, Ch. B., Buller, J., and Lawrence, J., and considered of by the Judges, Mich. T. 1796, 2 Leach 774. 2 East. P. C. c. 15. s. 25. p. 514. where it is said, that this it seems is not like the case of laying a robbery in the dwelling-house of A. which turns out to be the dwelling-house of B., because that circumstance is perfectly immaterial in robbery, which is ousted of clergy generally.

commit a felony, it will be supported by evidence of a felony actually committed. (d) And it seems sufficient in all cases where a felony has actually been committed, to allege the commission of it; as that is sufficient evidence of the intention. (e)

But different intents may be laid in the indictment. [\* 947]

It should be observed also, that different intents may be stated in the indictment. Thus, where the first count of an indictment for burglary laid the fact to have been done with intent to steal the goods of a person; and the second \*count laid it with intent to murder him; it was objected, upon a general verdict of guilty, that there were two several capital charges in the same indictment, tending to deprive the prisoner of the challenges to which he would have been entitled if there had been distinct indictments, and also tending to perplex him in his defence; but the indictment was holden good, on the ground that it was the same fact and evidence, only laid in different ways. (f)

Of the proceedings.

Having thus treated of the offence of burglary, according to its definition, we may enquire shortly concerning the proceedings against offenders by indictment.

Indictment. Allegation that the fact was done in the night.

It is essential that the indictment should state the fact to have been done in the night, *noctanter*, or *nocte ejusdem diei*. (g) And it must also express at about what hour of the night it happened; as where an indictment only alleged the fact to have been committed in the night, but did not express about what hour it was done, Gould, J. held it insufficient as for a burglary, and directed the prisoner to be found guilty of a simple felony only. And he gave as a reason, that as the rule now established is that a burglary cannot be committed during the *crepusculum*, it is therefore necessary to specify the hour, in order that the fact may appear, upon the face of the indictment, to have been done between the twilight of the evening and that of the morning. (h) It is not necessary, however, that the evidence should correspond with the allegation as to the hour, \*so that it shews the fact to have been committed in the night. (i)

[\* 948]

Allegation as to the mansion or dwelling-house.

The offence must be laid, as we have seen, to have been committed in a mansion-house, or dwelling-house, the term *dwelling-house* being that more usually adopted in modern practice. (k) It would not be sufficient to lay it generally as having been com-

d Rex v. Locost and Villars, Kel. 30 an indictment for a burglary with intent to commit a rape, and evidence of a rape actually committed.

e 1 Hale 560. 2 East. P. C. c. 15. s. 25. p. 514.

f Thompson's case, Norfolk Sum. Ass. 1781, and Mich. T. 1781, when the case was considered of by seven Judges only, who were unanimous that the indictment was good. 2 East. P. C. c. 15. s. 26. p. 515.

g 1 Hale 540. Ante, 900, 940.

h Waddington's case, Lancaster Lent Ass. 1771. 1 Burn's Just. Burglary. S. I. 2 East. P. C. c. 15. s. 24. p. 513. In 2 Hale 179. it is said, that the indictment ought to be *tali die circa horam decimam in nocte ejusdem diei felonice et burglariter fregit*; but that according to some opinions *burglariter* carries a sufficient expression that it was done in the night.

i 2 East. P. C. c. 15. s. 24. p. 513.

k Ante, 913, et sequ.

mitted in a house. (*l*) Where the burglary has been committed in an outhouse, which by law is considered as part of the dwelling-house, it must be laid as having been done in the dwelling-house, or in a stable, barn, &c. part of the dwelling-house; either of which statements may be adopted. (*m*) The parish in which the dwelling-house is laid to be situate must be correctly stated, as a variance in this respect will be fatal. (*n*)

The allegation of the offence having been committed in a mansion-house, must be understood, however, as confined to burglaries in private houses; for though it has been quaintly observed, that a church is *domus mansionalis Dei*, (*o*) it is the better opinion that the indictment, in the case of a burglary committed in a church, need not proceed upon such a supposition, but will be more properly framed, according to the truth of the fact, by stating the offence to have been committed in the parish church of the parish to which it belongs. (*p*)

It is necessary to state the name of the owner of the dwelling-house, in the indictment, with accuracy, and such \*certainty to a common intent, as is, in general, necessary in the description of a party who has sustained an injury. (*q*) In a case where the indictment stated the burglary to have been committed in the shop *cujusdam Ricardi*, without mentioning the surname of the owner, it was doubted whether it was good. (*r*) And where the name of the owner of the dwelling-house was altogether mistaken, as where the indictment laid the burglary to have been committed in the dwelling-house of John Snoxall, and it appeared that it was not the dwelling-house of John Snoxall, it was holden that the prisoner could not be found guilty either of the burglary, or of stealing to the amount of forty shillings in the dwelling house: it being essential in both cases, to state in the indictment the name of the person in whose house the offences are committed. (*s*) And where the prisoner was indicted for stealing in the dwelling-house of Sarah Luuns, and it appeared in evidence that her name was Sarah London; the variance was holden to be fatal to the capital part of the indictment. (*t*)

Statement  
of the name  
[\* 949]  
of the owner  
of the  
dwelling-  
house.

The terms of art usually expressed by the averment “fe- Terms of

*l* 1 Hale 550.

*m* Garland's case, 1 Leach 144. where an outhouse having been broken open, the indictment was for breaking and entering *the dwelling-house*: and Dobbs's case, 2 East. P. C. c. 15. s. 4. p. 512. and s. 25. p. 513. where the indictment was for breaking and entering the stable of J. B. *part of his dwelling-house*.

*n* 2 Stark. Crim. Plead. 415. note (*c*).

*o* 3 Inst. 64.

*p* 1 Hale 556. 1 Hawk. P. C. c. 38. s. 17.

*q* 2 East. P. C. c. 15. s. 24. p. 512.

*r* 2 East. P. C. c. 15. s. 24. p. 513. 1

Chit. Crim. Law 215, *et sequ.* 3 Chit. Crim. L. 1098. *Ante*, 927, *et sequ.*

*r* Cole's case, Moor 466. 1 Hale 558. 2 East. P. C. c. 15. s. 24. p. 513. In Moor it is said to have been holden good; but this is not mentioned by Lord Hale. In 3 Chit. Crim. L. 1098, it is said that there can be little doubt that at the present day such an omission would be considered as material.

*s* White's case, O. B. 1783. 1 Leach 252, 2 East. P. C. c. 15. s. 24. p. 513.

*t* Woodward's case, O. B. 1785. *cor.* Adair, Serjeant, Recorder. 1 Leach 253, note (*a*).



art—bur-  
glariously,  
—and  
broke and  
entered.

loniously and burglariously did break and enter” are essentially necessary to the indictment. The word *burglariously* cannot be expressed by any other word or circumlocution; and the averment that the prisoner *broke and entered* is necessary, because a breaking without an entering, or an entering without a breaking, will not make burglary. (*u*)

[\* 950]

Of laying  
the intent;  
and of  
joining  
burglary  
and lar-  
ceny in  
the same  
indictment.

\*With respect to the intent, it is clear that it must be expressly alleged in the indictment, and proved agreeably to the fact, either that the party committed a felony in the dwelling-house, or that he broke and entered the house with intent to commit a felony therein. (*x*) And it seems to be the better course first to lay the intent, and then state the particular felony, if a felony has actually been committed. For though where an indictment charges that the prisoner “the dwelling-house of A. B., feloniously and burglariously did break and enter and the goods of A. B. then and there feloniously and burglariously did steal, take, &c.” it comprises two offences, namely, burglary and larceny; and the prisoner may therefore be acquitted of the burglary, and found guilty only of the larceny; yet it seems he cannot be found guilty of the burglary if he be acquitted of the larceny, on the ground that when the offence is so charged the larceny constitutes part of the burglary. (*y*) It has therefore been recommended, by high authority, as the better way, to charge the prisoner with breaking, &c. with intent feloniously and burglariously to steal, &c. and to add also the particular felony; as upon such an indictment he may be convicted of a simple burglary, though acquitted of the felony. (*z*)

Of joining  
three of-  
fences in  
the same  
indictment.

It is also said, by the same high authority, that three offences may be joined in the same indictment; namely, burglary, larceny, and felony upon the statute of 5 and 6 E. VI. c. 9. for robbing a person in a dwelling-house, the owner, his wife, &c. then being within, whether waking or sleeping. And that upon such indictment, which need not conclude against the form of the statute, the prisoner may be convicted of the burglary, and found not guilty of felony; or convicted of the felony upon the statute 5 and 6 E. VI. c. 9. and found not guilty of the burglary; in either of which cases he would be ousted of his clergy; or he may be convicted  
[\* 951] \*of the larceny only, and found not guilty of the burglary and the felony upon the statute; in which case he would be entitled to his clergy. (*a*)

Of laying  
different in-  
tents.

We have already seen that different intents may be stated in the indictment; and such a mode of proceeding, by laying

*u* 1 Hale 550. 2 East. P. C. c. 15. s. 24.  
p. 512. *Ante*, 901.

*x* 1 Hale 550. *Ante*, 942, *et sequ.*

*y* 1 Hale 559, 560.

*z* 1 Hale 560.

*a* 1 Hale 561. 2 East. P. C. c. 15. s. 27.  
p. 516.

the same fact in different ways, may be rendered expedient by the particular circumstances of the case. (b)

It has been decided in an important case, in which the point was fully considered, that an acquittal upon an indictment for burglary, in breaking and entering a dwelling-house and stealing goods, cannot be pleaded in bar to an indictment for burglary in the same dwelling-house, and on the same night, *with intent* to steal; on the ground that the several offences described in the two indictments could not be said to be the same.

The indictment charged the prisoners with burglariously breaking and entering the dwelling-house of Merial Nevill and Ann Nevill, *with intent to steal* their goods; and they pleaded a plea of *autrefois acquit* upon a former indictment, which indictment charged them with burglariously breaking and entering the dwelling house of Merial Nevill and Ann Nevill, and stealing goods of Merial Nevill, goods of Ann Nevill, and goods of one Susanna Gibbs. The plea concluded with averring the identity of the persons of the prisoners, and that the burglary was the same identical and individual burglary. To this plea there was a demurrer, which was argued before all the Judges of England; and their opinion was afterwards delivered by Mr. Justice Buller at the Old Bailey June Session 1796.

The learned judge said that it had been contended on behalf of the prisoners, that as the dwelling-house in which, and the time when, the burglary was charged to have been committed were precisely the same both in the indictment for the burglary and stealing the goods, on which they were acquitted, and in the indictment for the burglary *with intent to steal* the goods, which was then depending; the offence charged in both was, in contemplation of law, the same offence, and that of course the acquittal on the former indictment was a bar to all further proceeding on the latter. He then proceeded, "It is quite clear, that at the time the felony was committed, there was only one act done, namely, the breaking the dwelling-house. But this fact alone will not decide this case; for burglary is of two sorts; first, breaking and entering a dwelling-house in the night time, and stealing goods therein; secondly, breaking and entering a dwelling-house in the night time, *with intent to commit a felony*, although the meditated felony be not in fact committed. The circumstance of *breaking* and *entering* the house is common and essential to both the species of this offence: but it does not of itself constitute the crime in either of them; for it is necessary, to the completion of burglary, that there should not only be a breaking and entering, but the breaking and entering must be accompanied with a fe-

Of the plea of *autrefois acquit*.

Rex v. Vandercomb and Abbott. A prisoner indicted for burglary, in breaking and entering a dwelling-house with intent to steal, cannot plead in bar an acquittal upon an indictment for the same burglary which charged a breaking and entering the same dwelling-house and stealing there.

[\* 952]



lony actually committed, or intended to be committed; and these two offences are so distinct in their nature, that evidence of one of them will not support an indictment for the other. (c) In the present case, therefore, evidence of the [\* 953] \*breaking and entering with intent to steal, was rightly held not to be sufficient to support the indictment charging the prisoner with having broke and entered the house, and stolen the goods stated in the first indictment; and if crimes are so distinct, that evidence of the one will not support the other, it is as inconsistent with reason, as it is repugnant to the rules of law, to say that they are so far the same that an acquittal of the one shall be a bar to a prosecution for the other."

The learned judge then observed, upon the cases which had been cited on behalf of the prisoners, in support of the proposition contended for by their counsel; namely, Turner's case, (d) and the case of Jones and Beaver. (e) In Turner's case it was agreed that the prisoner having been formerly indicted for burglary, in breaking the house of a Mr. Tryon, and stealing his goods, and acquitted, could not be indicted again for the same burglary, in breaking his house, and stealing therein the money of one Hill, (a servant of Mr. Tryon) but that he might be indicted for felony in stealing the money of Hill. Upon this case Mr. J. Buller observed: "The decision was not a solemn judgment, for the prisoner was not indicted a second time for the burglary; it was merely a direction from the Judges to the officer of the court how to draw the second indictment for the larceny; and it proceeded upon a mistake, as I shall presently shew. If the Judges in that case exercised a little lenity before the indictment, which might more properly [\* 954] have been done after conviction, much censure \*could not fall on them. But they proceeded on the ground that Turner, having been indicted for burglary, in breaking the house of Mr. Tryon, and stealing his goods, and acquitted thereof, could not be again indicted for the same burglary for breaking the house, though he might be indicted

c It is well established that an indictment for breaking and entering, &c. and stealing goods, will not be supported by evidence of a breaking and entering, &c. with intent to steal them. But it has been supposed, that an indictment for breaking and entering, &c. with intent to steal, will be supported by evidence of breaking and entering, &c. and an actual stealing. *Ante*, 945, 950. If this be so, the report of the judgment delivered by Mr. J. Buller, as here given, states the point too largely; as it seems to go to the extent of saying that evidence of a breaking and entering, and a felony actually committed will not support an indictment for a breaking and entering, &c., and a felony intended to be com-

mitted. In 2 East. P. C. c. 15. s. 29. p. 520, the learned author observes upon this case, and says "*Quære*, whether the definition of the crime be not solely resolvable into the breaking, &c. with an intent to commit felony; of which the actual commission is such a strong presumptive evidence that the law has adopted it, and admits it to be equivalent to a charge of the intent in an indictment. And therefore an indictment charging the breaking, &c. to be with intent to steal, is said to be supported by proof of actual stealing; though certainly not vice versa."

d Kel. 30.

e Kel. 52.

for stealing the money of Hill, for which he had not been indicted before: and he was indicted accordingly. The Judges, therefore, must have conceived that the *breaking the house* and the *stealing the goods* were two distinct offences; and that breaking the house only constituted the crime of burglary; which is a manifest mistake: for the burglary consisted in breaking the house and stealing the goods; and if stealing the goods of Hill was a distinct felony from that of stealing the goods of Tryon, which it was admitted to be, the burglaries could not be the same."

With respect to the case of Jones and Beaver, the learned judge said, that it proceeded entirely upon the decision in Turner's case; and that, the foundation failing, the superstructure could not stand. (f)

The learned judge then referred to several authorities, (g) and continued, "These cases establish the principle, that unless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second. Now, to apply the principle to the present case: the first indictment was for burglariously breaking and entering the house of Miss Nevills, and stealing the goods mentioned; but it appeared that the prisoner broke and entered the house *with intent to steal*; for, in fact, no larceny was committed, and therefore they could not be convicted on that indictment. But they have not been tried for burglariously breaking and entering the house of the Miss Nevills *with intent to steal*, which is the charge in the present indictment, and therefore their lives have never been in jeopardy for this offence. For this reason, the Judges are all of opinion that the plea is bad; that there must be judgment for the prosecutor upon the demurrer; and that the prisoners must take their trials on the present indictment." And the prisoners were accordingly tried, and convicted. (h)

In the foregoing case the property in the goods was laid differently in the two indictments. The first, upon which the prisoners had been acquitted, stated some of the goods stolen to belong to Merial Nevill, others to Ann Nevill, and others to Susanna Gibbs; and the second indictment stated the goods intended to be stolen to belong to Merial and Ann Nevill only. And it is said that Buller, J. in delivering the opinion

*Autrefois acquit*, will not be an effective plea unless the facts contained [\* 955] in the second indictment would, if true, have sustained the first indictment.

A party indicted for burglary, and stealing the goods of a particular person, and acquitted.

f Rex v. Jones and Beaver, Kell. 10. The prisoners were indicted for burglariously breaking and entering the dwelling-house of Lord Cornbury, and stealing his goods therein, and, being acquitted, were afterwards indicted for the same burglary, in breaking and entering Lord Cornbury's house, and stealing the goods of a Mr. Nunnsey, and it was agreed that, as they had been before

acquitted, they could not be indicted again for the same burglary, but that they might be indicted for the felony in stealing the goods of Mr. Nunnsey, precisely as had before been done in Turner's case.

g 2 Hawk. P. C. c. 35, s. 2. Fost. 361, 362. Rex v. Pedley, 1 Leach 242.

h Vandercomb and Abbott (case of,) 1796, 2 Leach 216. 2 East. P. C. c. 15, s. 24, n. 516.

may afterwards be indicted for the same burglary, and stealing the goods of a different person.

[\* 956]

If a prisoner be charged with a burglary and stealing the goods, the prosecutor, on failing to prove that these facts were committed on the day laid in the indictment, cannot be admitted to prove that the larceny was committed on a former day.

Verdict.

[\* 957]

of the Judges on the case, observed, that the property in the goods was differently described in the two indictments, and said, that this might afford another objection to the plea; but that he had not entered into the consideration of the circumstance, as the case did not require it. (i) And the ancient doctrine, that a person indicted and acquitted for breaking and entering a dwelling-house in the night, and there stealing the goods of one person, could not be afterwards indicted for the same breaking and entering, \*and stealing the goods of another person, appears to have been overruled in this case, when the authorities by which it was supposed to have been established, were denied to be law. (k)

Where, upon an indictment for a burglary and stealing goods, the prosecutor failed to prove any nocturnal breaking, or any larceny, subsequent to the time when the prisoners entered the house, which must have been after three o'clock in the afternoon of the day on which the offence was charged to have been committed; it was proposed to give evidence of a larceny by the prisoners, of some of the articles mentioned in the indictment, though committed before three o'clock on the day on which they were charged to have entered the house; but the court refused to receive the evidence. They said, that the charge contained in the indictment of burglariously breaking and entering the house, and stealing the goods, might unquestionably be modified, by shewing that the prisoners stole the goods without breaking open the house; but that the charge proposed to be introduced went to connect the prisoners with an antecedent felony committed before three o'clock on the day mentioned, at which time it was clear that they had not entered the house; that the transactions were distinct; and that it might as well be proposed to prove any felony which those prisoners might have committed in that house seven years before. (l)

Where a larceny, whether within or ousted of clergy, is charged in the same indictment with a burglary, the prisoner may, as we have seen, be found not guilty of the burglary, and convicted of the larceny. (m) Thus, where the prisoners were acquitted of the burglary, upon an indictment for a burglary and larceny, and found guilty of stealing \*in the dwelling-house to the amount of forty shillings, it was holden that they were excluded from their clergy, though there was no separate and distinct count in the indictment on the statute 12 Ann. c. 7.: and the Judges were of opinion that the indictment contained every charge that was necessary in an indictment upon that statute. (n)

i 2 East. P. C. c. 15. s. 29. p. 519. note (b.)  
k Viz. Turner's case, and the case of Jones and Beaver, *ante*, 953, 954.  
l Vandercomb and Abbott, 2 Leach 708.

m *Ante*, 950.  
n Withal and Overend (case of,) *Guildford Ass.* 1772, Hil. T. 1774. 1 Leach 88.

In this case the finding of the jury was, “not guilty of breaking and entering the dwelling-house in the night, but guilty of stealing the box and money in the dwelling-house:” (o) upon which, part of the objection, on behalf of the prisoners, was, that they were not excluded from clergy, because the jury had acquitted them of the burglary. (p) And formerly it appears to have been doubted, whether, where the words “not guilty of the burglary” were a part of the finding of the jury, the prisoner was not by necessary consequence acquitted of the felony also. (q) But in a more recent case, where the indictment was for a burglary and larceny, and the verdict was “not guilty of the burglary, but guilty of stealing above the value of forty shillings in the dwelling-house;” and the entry by the officer was in the same words; the Judges, after some debate, and after adjourning the case to a subsequent term, held the finding sufficient to warrant a capital judgment. They agreed, that if the officer were to draw up the verdict in form, he must do it according to the plain sense and meaning of the jury; and that the minute was only for his future direction. (r)

Not guilty of the burglary, but guilty of stealing above the value of 40 shillings in the dwelling-house.

\*It seems, that where several persons are indicted together for a burglary and larceny, the jury cannot find one guilty of the burglary and another guilty of the larceny only, upon the same indictment, and the same evidence; as such a finding would shew that the offences of the several prisoners were of a distinct nature, and therefore ought not to have been included in the same indictment. (s) [\* 958]

Where several persons are indicted together, one cannot be found guilty of burglary and another of larceny.

Burglary was at common law a felony within the benefit of clergy; (t) but a higher punishment is now imposed by the provisions of several statutes. The first statute in order of time is the 1 Edw. VI. c. 12. by which it is enacted, that persons attainted or convicted of breaking any house by day or by night, any person being then in the same house where the same breaking shall be committed, and thereby put in fear or dread, or being indicted or appealed of the same offence, and thereupon found guilty by verdict, or shall confess the same upon arraignment, or will not answer directly according to the laws of this realm, or shall stand wilfully or of malice mute, shall not be admitted to the benefit of clergy.” The statute 18 Eliz. c. 7. enacts, “that if any person shall com-

Punishment of principal offenders.

o In the indictment the box was described as containing sixty pounds of money.

p Withal and Overend (case of,) 1 Leach 38. 2 East. P. C. c. 15. s. 28. p. 517.

q Comer's case, 1744, 1 Leach 36. 2 East. P. C. c. 15. s. 28. p. 516.

r Hungerford's case, *Bristol*, 1790, East. and Trin. T. 1790, 2 East. P. C. c. 15. s. 28. p. 518. Many of the Judges thought that an entry, “not guilty of the breaking and entering in the night, but guilty of the stealing, &c.” would be more correct. But it appeared

upon inquiry to be the constant course on every circuit in England, upon an indictment for murder, where the party was only convicted of manslaughter, to enter the verdict “not guilty of murder, but guilty of manslaughter;” or, “not guilty of murder, but guilty of feloniously killing and slaying;” and yet murder includes the killing.

s Rex v. Turner and others, 1 Sid. 171. 2 East. P. C. c. 15. s. 28. p. 519.

t 3 Inst. 63, 65. 4 Black. Com. 228.

mit burglary and be found guilty by verdict, or be outlawed for such offence, or upon arraignment shall confess such burglary, every such person shall suffer death, and forfeit, as in cases of felony, without any allowance of the benefit of clergy."

Of accessories before.

[\* 959]

Of the principal offender standing mute, &c.

Of accessories after.

23 Geo. III. c. 88. as to persons apprehended with implements of house-breaking upon them.

[\* 960]

This statute did not deprive accessories of their clergy; but as to accessories *before*, the statute 3 W. and M. c. 9. s. 1. enacts, "that every person who shall counsel, hire, or \*command any person to commit any burglary, being thereof convicted or attainted, or being indicted thereof and standing mute, or not directly answering to the indictment, or peremptorily challenging above the number of twenty, shall not have the benefit of clergy:" and by the second section of this statute, any principal offender standing mute, not answering directly, or challenging peremptorily above twenty, (*u*) or being outlawed thereupon, is deprived of his clergy.

With respect to accessories after, the 5 Anne, c. 31. s. 5 enacts, that any person who "shall receive, harbour, or conceal any burglars, felons, or thieves, knowing them to be so, shall be taken and received as accessory to the said felony; and being legally convicted by the testimony of one or more credible witnesses, shall suffer death as a felon convict."

In concluding this chapter upon Burglary, it may be useful to refer to the statute 23 Geo. III. c. 88. which was passed for the purpose of preventing this offence and that of house-breaking. It enacts, "that if any person or persons shall be apprehended, having upon him, her, or them, any picklock key, crow, jack, bit, or other implement, with an intent feloniously to break and enter into any dwelling-house, warehouse, coach-house, stable, or out-house; or shall have upon him, her, or them, any pistol, hanger, cutlass, bludgeon, or other offensive weapon, with intent feloniously to assault any person or persons; or shall be found in or upon any dwelling-house, warehouse, coach-house, stable, or outhouse, or in any inclosed yard or \*garden, or area belonging to any house, with an intent to steal any goods or chattels;" every such person shall be deemed a rogue and vagabond within the 17 Geo. II. c. 5. (*x*) In a case upon this statute, 23 Geo. III. a warrant of commitment was holden defective, because it did not state that the defendant was apprehended with the implements of housebreaking upon him *at the time of such apprehension*. (*y*)

*u* At this time the illegal challenges would be disallowed. The 22 Hen. VIII. c. 14. s. 6. (continued by 28 Hen. VIII. c. 1. and made perpetual by 32 Hen. VIII. c. 3.) enacts, that no person arraigned for felony be admitted to any peremptory challenge above the number of twenty. And this has been construed in practice to imply, that the challenge above

that number shall be void; without affixing any other penalty. 4 Black. Com. 354.

*x* For the proceedings against rogues and vagabonds, see 5 Burn. Just. *Vagrants*.

*y* Rex v. Brown, 8 T. R. 26. Lord Kenyon, C. J. said, that he yielded with great reluctance to the objection.



## \*CHAPTER THE SECOND.

*Of Sacrilege, or of Robbery and Larceny in Churches and Chapels. (1)*

THIS offence may be committed either with or without violence or breaking of the church or chapel. Where the breaking of a church is in the night time, the offence has, we have seen, been considered to be burglary. (a)

The 23 Hen. VIII. c. 1. s. 3. enacts, that "no person who shall be found guilty for robbing of any churches, chapels, or other holy places, nor any person found guilty of any abetment, procurement, helping, maintaining, or counselling of or to any such felony, shall be admitted to the benefit of clergy." (b)

It has been said, that no sacrilege is within this statute, unless it be accompanied with an actual breaking of the church, &c. (c) But a subsequent statute applies to this offence, though there be no breaking.

This latter statute is the 1 Edw. VI. c. 12. the tenth section of which enacts, that "no person that shall be attainted or convicted of the felonious taking of any goods out of any parish church, or other church or chapel," shall have the benefit of clergy; (d) and thus excludes principal offenders from their clergy, in cases in which it would have been requisite for them to have prayed clergy, namely, where the value of the property stolen is above twelve pence.

But it seems that accessories in the offence of sacrilege are not at this time excluded from their clergy by any statute. The statute 23 Hen. VIII. c. 1. did indeed expressly extend to accessories, but it appears to have been repealed, in that

23 Hen. VIII. c. 1. s. 3. No person robbing any church, &c. to be admitted to clergy.

Upon this statute there must be a breaking.

1 Edw. VI. c. 12. s. 10.

No person feloniously taking goods out of a church, to be admitted to clergy.

Accessories not excluded from clergy.

Accessories not excluded from clergy.

a *Ante*, §99, note (a).

b There is an exception as to persons in holy orders. The 25 Hen. VIII. c. 3. s. 2. extends this statute to persons standing mute, challenging above twenty, or not answering directly.

c Kel. 59. 69. 1 Hawk. P. C. c. 34. Of

Robbery in a Church, &c. s. 3. 1 Hale P. C. 518. note (h). 2 Hawk. P. C. c. 33. s. 73.

d This statute ousts sacrilege of clergy in all cases except that of challenging above twenty, which defect was supplied by 3 W. and M. c. 9. 1 Hale 518. 1 Hawk. P. C. c. 36. Larceny from Church, &c. s. 4.

(1) MASSACHUSETTS.—By the statute of 1804 Chap. 143. Larceny in Churches and meeting-houses, is put upon the same footing, and punished in the same manner, as larcenies in other buildings erected for public uses.

And by section 5th of the same statute, the punishment for entering in the night time, without breaking, or for breaking and entering in the day time any dwelling house or out houses thereto adjoining and occupied therewith, or any office, shop, ware-house, ship or vessel, the owner or other person being therein and put in fear, is solitary imprisonment not exceeding one year, and confinement to hard labour not exceeding ten years. *Vide post*, Larceny; where the whole subject of larceny, simple and compound, will be found brought into one view.

respect at least, by subsequent enactments; (e) and that statute appears to have been the only one which extended to them, where the offence did not amount to burglary. (f) It has, however, been made a question, whether there be need of any statute to exclude them, as the common law seems to have given no person any right to demand the privilege of clergy for sacrilege, except at the discretion of the ordinary. (g)

[\* 963]

4 Geo. II. c. 32. relating to the stealing, &c. of any lead, iron, &c. fixed to any house or other building extends to a church.

\*It has been holden that the statute 4 Geo. II. c. 32. which makes it felony, punishable by transportation for seven years, to steal, rip, cut, or break, with intent to steal, any lead, iron bar, iron gate, iron pallisade or iron rail fixed to any dwelling-house, &c. or to any other building whatsoever, or fixed in any garden, &c. fence, or outlet belonging to any dwelling-house, or other building; (h) extends to a church. (i) This was the opinion of a majority of the Judges; though there was some doubt whether the words "other building" in the act ought not to be construed with reference to the same sort of buildings as were before expressed. (k) And in a case which occurred shortly afterwards, the Judges were unanimous upon the point that a church is included within the words, "any other building whatsoever." (l) But in a case where the prisoner was charged, upon an indictment on the same statute, with stealing iron rails fixed to a tomb in a church-yard belonging to a certain building, called Islington church, and it appeared that the tomb was not connected by any building with the church, it was holden by all the Judges that the offence laid was not within the statute. (m)

Indictment. Statement of property under the statute of 4 Geo. II. c. 42.

In one of the cases which has been cited, it was agreed by all the Judges, that the property of lead fixed to a church cannot be laid to be either in the churchwardens, or in the inhabitants and parishioners. (n) And this opinion seems to have been confirmed in another of the cases, where the

e In 2 Hale 365, it is said, that the 23 Hen. VIII. c. 1. is repealed by 1 Edw. VI. c. 12. as to all accessories. Hawkins says, 2 Hawk. P. C. c. 33. s. 75. that though accessories are expressly mentioned by 23 Hen. VIII. c. 1. yet since they are omitted by 25 Hen. VIII. c. 3. (*ante*, note (b)) and so much only of the 23 Hen. VIII. c. 1. is revived, as is affirmed and enforced by 25 Hen. VIII. c. 3. they seem to remain in the same case as if they had been wholly omitted by 23 Hen. VIII. c. 1. which is the only statute he knows of which extends to them. In 2 East. P. C. c. 16. s. 57. p. 624. the learned writer says of the statute 23 Hen. VIII. c. 1. that it is much to be doubted whether it be not repealed as to the point of clergy by the statute 1 Edw. VI. c. 12. which supplies its place in a great measure; and if so, not revived by the statute 5 and 6 Edw. VI. c. 10.

f 1 Hawk. P. C. c. 34. *Robbery in Church*, &c. s. 2. 2 Hawk. P. C. c. 33. s. 75. 2 East.

P. C. c. 16. s. 67. p. 630.

g 2 Hawk. P. C. c. 33. s. 9. and 76. It is said, however, that clergy was not taken away from sacrilege at common law, but that the offender could not have it if the ordinary refused him. 2 Hale 333, 366, note (d.) Elsewhere it is said, that clergy was not allowed by the common law in sacrilege. 3 Bac. Ab. *Felony* (G).

h See the statute and also the 21 Geo. III. c. 68., by which its provisions are extended to copper, brass, and bell metal, cited more at large *post.* in the Chapter on *Larceny*.

i Rex v. Parker and Easy, *Suffolk Sum. Ass.* 1782. and Mich. T. 1782. 2 East. P. C. c. 16. s. 31. p. 592.

k *Id. Ibid.*

l Hickman and Dyer (case of), O. B. 1784. East. T. 1785. 1 Leach 318.

m Davis's case, 2 East. P. C. c. 16. s. 31. p. 593.

n Rex v. Parker and Easy, *ante* note (i)

first count of the indictment was for stealing lead "*belonging to the Reverend C. G. clerk, then and there fixed to a certain building called Hendon church;*" the second count stated the lead as "*belonging to J. B. and R. M. the church-wardens;*" and the third stated it as "*belonging to the inhabitants and parishioners:*" but the majority of the Judges there held that the first count of the indictment which laid the property of the lead to be in the vicar was good. (a) Many of them, however, thought that it would have been better to have alleged, that the lead was "*fixed to a certain building, being the parish church, &c.*" without stating the property to be in any one: and Buller, J. thought that charging it to be property was absurd and repugnant, and that the allegation as to property in that indictment might be rejected as surplusage. (p) [\* 964]

The decisions and opinions in these cases probably turned very much upon the particular nature of the property which had been stolen. For it has been holden that where the bells, books, or other goods belonging to a church are stolen, they may be laid in the indictment to be the goods of the parishioners. (q) And it is said, that he who takes away the goods of a chapel or abbey, in time of vacation, may be indicted, in the first case, for stealing *bona capellæ*, being in the custody of such and such; and in the second, for stealing *bona domus vel ecclesiæ, &c.* (r) Statement of property in other cases.

The taking up dead bodies, though for the purposes of dissection, has been before spoken of as an indictable offence, and a matter of great indecency: (s) but the stealing of them is not a felony. (t) It appears, however, to be larceny at common law, to steal a shroud from a corpse, or a coffin from a vault or grave; (u) and, as such, the offence will be more properly mentioned in a subsequent chapter. (x) Taking up dead bodies, and stealing shrouds or coffins.

a Hickman and Dyer (case of), *ante* note (d). The soil and freehold of the body of the church is in the vicar, Wats. Clerg. Law 398, 399, 400.

p *Id. Ibid.* and 2 East. P. C. c. 16. s. 31. p. 593. S. C. See also Isley's case, O. B. 1785. 1 Leach 320, note (a) S. P.

q 1 Hale 512. 2 Hale 81. 1 Hawk. P. C.

c. 33. s. 45. 2 East. P. C. c. 16. s. 89. p. 651.

r *Id. Ibid.*

s *Ante* 606.

t 2 East. P. C. c. 16. s. 89. p. 652.

u 1 Hale 515. 2 Hale 181. 1 Hawk. P. C. c. 33. s. 46. 4 Black. Com. 236. 2 East. P. C. c. 16. s. 89. p. 652.

x *Post* Chap. on Larceny.



## \*CHAPTER THE THIRD.

## Of House-Breaking.

BESIDES the nocturnal house-breaking or burglary, which has been treated of in the first chapter of this book, the law of England, in its especial regard for the safety and security of the habitation of man, has, in many cases, provided, that the forcible invasion of the dwelling-house of another, or house-breaking, when accompanied with felony, shall be liable to capital punishment, though committed in the day-time.

The 1 Edw. VI. c. 12. s. 10. enacts, that no person or persons attainted or convicted of breaking of any house by day or by night, any person being then in the same house, where the same breaking shall be committed, and thereby put in fear "or dread;" or being indicted or appealed of any such offence, and found guilty; or confessing upon arraignment, or not answering directly, or standing wilfully mute; shall be admitted to the benefit of clergy. (a)

1 Edw. VI.  
c. 12. s. 10.  
Breaking a  
house by  
day or night,  
any person  
being there-  
in, and put  
in fear.

Construc-  
tion of this  
statute.

[\* 966]

The "breaking" mentioned in this statute, must be an actual breaking; such as, if done in the night, would have amounted to burglary. (b) And the breaking must be \*attended with some felony; so that though a house be broken in the day-time with a felonious intent, it will not be an offence within the statute, if nothing be taken. (c) And there must be a putting of some person within the house in fear. (d)

Aiders and  
accessories.

Aiders and abettors at the fact of such a breaking and stealing, though they do not enter the house, are ousted of clergy by this statute. And so also are accessories before by the particular provisions of the 4 and 5 Ph. and M. c. 4., because the felonious taking, being accompanied with a breaking, seems properly enough to come under the notion of robbery in a dwelling-house; all accessories to which before the fact are expressly excluded from their clergy by that statute. (e)

a This statute did not exclude from clergy persons challenging peremptorily above twenty; but they were afterwards excluded by 3 and 4 W. and M. c. 9.

b 1 Hale 548. 2 Hawk. P. C. 33. s. 83. Fost. 108. 2 East. P. C. c. 16. s. 68. p. 631. *Ante*, 901. In the marginal note to the case of Hamilton and Chesser, 1 Leach 348, there is a *quære* whether an indictment on this statute would be supported by proof of breaking open an inner door and the lock of a cupboard, where admission to the house had been obtained by fraud. But see *ante*, 905, 908.

c 2 Hale 353. 2 East. P. C. c. 16. s. 68. p. 631. Lord Hale, however, had laid down a contrary doctrine in the former part of his

work, namely, that an entry with intent to commit a felony, though nothing were stolen, was within the statute. 1 Hale 548, 562, 563.

d 2 Hale 353. 2 East P. C. c. 16. s. 68. p. 631.

e 2 Hawk. P. C. c. 33. s. 87. 1 Hale 563. 2 East. P. C. c. 16. s. 68. p. 631. But if this offence were considered as complete without any felonious taking, and only by a breaking and entering, and putting in fear; accessories before would not be deprived of their clergy, 1 Hale 563. 2 Hale 353, 354, 361, 362. It should be observed of this statute 4 and 5 Ph. and M. that though it is general as to all robberies, in any dwelling-house, yet it is re-

The stat. 5 and 6 *Edw. VI. c. 9.*, after reciting a former act of 23 *H. VIII. c. 1.* concerning robbing persons in their dwelling-houses, and some doubts which had arisen upon its construction, (*f*) enacts and ordains “that if any person or \*persons be found guilty for robbing of any person or persons, in any part or parcel of their dwelling-houses, or dwelling-places; the owner or dweller in the same house, or his wife, his children, or servants being then within the same house or place, where the same robbery and felony shall be committed; or in any other place within the precinct of the same house or dwelling-place; such offenders shall in no wise be admitted to their clergy, whether the owner or dweller in the same house, his wife or children then and there being, shall be waking or sleeping.” (*g*)

5 & 6 *Edw. VI. c. 9. s. 4.* Robbing any persons in their dwelling-houses, the owner, &c. being within the precinct of the house, either sleeping or waking. [\* 967]

The fifth section further enacts, “that no person or persons who shall be found guilty of robbing any person or persons in any booth or tent in any fair or market, the owner, his wife, his children, or servants, or servant, then being within the same booth or tent, shall (not) from henceforth be admitted to the benefit of clergy, but utterly be excluded, &c.” without respect to the consideration whether the owner or dweller in such booths and tents, his wife, children, or servants being in the same, at the time of such robberies and felonies committed, were sleeping or waking.

S. 5. Robbing any persons in any booth or tent, in any fair or market, the owner, &c. being within, either sleeping or waking.

Upon this statute the construction has been, that though the statute does not mention a breaking, yet an actual breaking, such as would make a burglary, if committed in the night, is necessary; and the reason given is, that the statute speaking of *robbing* imports more than a bare taking of goods, &c.; and implies some actual violence. (*h*) An intent to rob is not sufficient: there must be an actual felonious \*taking away of some property. (*i*) And it is said, that the value of the property stolen must be above twelve-pence; on the ground that the statute did not alter the nature of the offence, but only took away clergy where clergy was allowed before, namely, where the offence was capital, as in grand larceny. (*k*) It is not enough that a stranger, or sojourner, be in the house at the time of the robbery: either the owner, or his wife, children, servants, or ser-

[\* 968]

strained by the construction which has been put upon it, to such robberies in dwelling-houses as are excluded from clergy by some former statute. 1 *Hale* 522. 11 *Co.* 37. 2 *East. P. C. c. 16. s. 61.* 1 p. 628.

*f* This statute of 23 *Hen. VIII. c. 1.* was made perpetual by 32 *Hen. VIII. c. 3.* It is stated as doubtful whether it was not repealed as to point of clergy, by 1 *Edw. VI. c. 12.* which supplies its place in a great measure: and, if so, not revived by 5 and 6 *Edw. VI. c. 10.*

*g* 5 and 6 *Edw. VI. c. 9. s. 4.*  
*h* 1 *Hale* 522, 523. 2 *Hale* 352, 353. 1 *Hawk. P. C. c. 34. s. 2.* *Hawk. P. C. c. 33. s. 92.* 2 *East. P. C. c. 16. s. 72. p. 636.* But *quære* if any other violence amounting to a robbery would not bring a case within this statute as well as a breaking of the house. See *Kel.* 68, 69.

*i* 1 *Hale* 522, 526. 2 *Hale* 355, 1 *Hawk. P. C. c. 34. s. 6.*

*k* 1 *Hale* 531. 2 *East. P. C. c. 16. s. 70. p. 631.* And see *post.* 971

vant (according to the words of the statute) must be within the precinct of the house at the time: (*l*) but it is not necessary that they should be in the same room where the robbery is committed. (*m*) It has been ruled that robbing a shop, such as was formerly kept in *Westminster Hall*, and like those which are now kept in *Exeter Change*, is not robbing a booth or tent, within the meaning of this statute. (*n*)

Principals  
aiders and  
accessories.

Principals in this offence of robbing in a dwelling-house, and also aiders and abettors, though they do not actually enter the house, are ousted of clergy; and so also are accessories before, by the provisions of 4 and 5 Ph. and M. c. 4. and 3 W. and M. c. 9. (*o*) But it does not appear that accessories before to a robbery in a booth or tent are ousted of clergy by any statute, unless the robbery be from the person; in which case the statute 3 W. and M. c. 9. will apply, the other statute 4 and 5 Ph. and M. c. 4. extending only to dwelling-houses.

[\* 969] It is suggested by Lord Hale, that an indictment against \*an aider and abettor should charge such person not generally, as “present, aiding, and abetting;” but as “maliciously commanding, hiring, or counselling to commit the fact,” so as to comply with the words of the statute 4 and 5 Ph. and M. c. 4: but that learned Judge gives his own opinion that the words “maliciously present, aiding, and abetting,” are sufficient; as being tantamount to the former, and more. (*p*) And he also states his opinion, that all may be indicted, *quod fregerunt et intraverunt*, as in cases of burglary or robbery. (*q*)

This statute of the 5 and 6 Edw. VI. c. 9. is spoken of as having been at one time in great and daily use; (*r*) but it appears now, together with the former act of 1 Edw. VI. c. 12. s. 10. to have been rendered of less importance (*s*) by a subsequent statute 3 W. and M. c. 9. which takes away clergy from persons robbing any dwelling-house in the day-time, any person being therein. The robbing in the statute of W. and M. implies a breaking; and as the statute does not require that the party in the house should be *put in fear*, which is necessary under the 1 Edw. VI. c. 12. s. 10, and

*l* 1 Hale 522. 2 Hale 355. 1 Hawk. P. C. c. 34. s. 3. 2 Hawk. P. C. c. 33. s. 93. An indictment was laid upon this statute, for breaking the king's mansion at Whitehall, and stealing Sir H. Hungate's goods there, divers of the king's servants then being in the house. 1 Hale 522. Rex v. Williams and others 14 Car. 1.

*m* 1 Hale 522.

*n* 1 Hawk. P. C. c. 34. *Robbery in a Booth, &c.* s. 2. 1 Hale 524.

*o* 2 East. P. C. c. 16. s. 72. p. 637.

*p* 1 Hale 522.

*q* *Id. Ibid.* And see *ante*, 37. *post.* 975.

*r* 1 Hale 520.

*s* The later books do not supply many cases upon either of these statutes. In 1784, an indictment in a case at the Old Bailey contained a count upon the statute 1 Edw. VI. c. 12.: but an objection was taken that the breaking of the house was not sufficiently proved; and the prisoner was convicted upon a second count in the indictment, upon the statute 12 Anne, c. 7. for stealing goods in the dwelling-house to the value of forty shillings. Hamilton's case, 1 Leach 348.

as it applies to cases where *any person* is in the house, and not like the 5 and 6 Edw. VI. c. 9. to cases only where the "owner or dweller, his wife, children, or servants," may be there, it appears to be more comprehensive than either of the former statutes.

The words of the 3 W. and M. c. 9. as applicable to this \*subject, are "that all and every person or persons that shall rob any dwelling-house in the day-time, any person being therein; or shall comfort, aid, abet, assist, counsel, hire, or command any person or persons to commit the said offence, or to break any dwelling-house, shop, or warehouse thereunto belonging, or therewith used in the day-time, and feloniously take away any money, goods, or chattel of the value of five shillings or upwards therein being, although no person shall be within such dwelling-house, shop, or warehouse" being convicted, or attainted, standing mute, not answering directly or challenging above twenty, shall not have the benefit of clergy. (t)

3 W. and M. c. 9. s. 1. Robbing any house in the day time, any person being therein. [\* 970]

In a case in which the construction of this statute came under the consideration of the twelve Judges, Mr. Justice Gould in delivering their opinion, said, "The word *rob*, in a legal construction, always includes the idea of *force and violence*: and although the statute does not expressly signify that *breaking and entering* the house is necessary to constitute the crime, yet it has always been held upon this statute, as well as upon other acts of parliament penned in the same manner, that those ingredients are *ex vi termini* included in and implied by the word "*rob*." It is therefore essential to consider what degree of breaking and entering is necessary; and it is settled in a variety of determinations upon the statutes relating to this subject, that the breaking must be of a *dwelling-house*, in the same way as would be necessary to constitute the crime of burglary upon the rules of the common law; the only difference between the two offences being, that burglary must be committed in a dwelling-house in the night time, and this offence must be committed in a dwelling-house by day." (u)

Construction of this statute.

It should, however, be observed, that in some respects \*this offence differs from that of burglary; inasmuch as here, by the necessary implication of the word "*rob*," there must be an actual taking of property; while in burglary, as we have seen, a felonious *intent*, though not executed, is sufficient: (w) and with respect to the value of the property taken, it seems that, according to the usual interpretation of the statute, it must be above a shilling in order to oust the

[\* 971]

t 3 W. and M. c. 9. s. 1.

u Trapshaw's case, 1 Leach 428. *Ante*, 937. And see 2 East. P. C. c. 16. s. 69. p.

633., and s. 72. p. 636.

w *Ante*, 942. *et sequ.*

offender of clergy ; unless, indeed, it be taken in the presence of some person in the house, so as to amount in law to a robbery properly so called. (x)

Principals  
breaking  
any shop or  
warehouse,  
and steal-  
ing to the  
value of  
five shil-  
lings.

39 Eliz. c.  
15.  
Robberies  
in the day-  
time in  
house, no  
person be-  
ing therein.

It should also be observed, upon the construction of this statute, that as it has ousted of clergy the accessories before to a breaking of any "shop or warehouse" belonging to, or used with a dwelling-house, and stealing therein to the value of five shillings ; it seems that it must necessarily, and by implication, be taken to have ousted the principals also under the like circumstances. (y)

A robbery committed in the day-time, in a house left without any person to protect it, was less penal, after the passing of the statutes of Edw. VI., than when committed in the day-time in a house while some person was within ; and the statute 39 Eliz. c. 15. recites that this circumstance had emboldened wicked persons "to watch their opportunity and time to commit many heinous robberies, in breaking and entering divers honest persons' houses, and especially of the poorer sort of people, who, by reason of their poverty, were not able to keep any servant, or otherwise to leave any body to look to their house, when they went abroad to hear divine service, or from home to follow their labour to get their living, to the hindrance and loss of good subjects, and the utter impoverishing of many poor widows, sole women, and other people."

[\* 972]

39 Eliz. c.  
15. s. 2.  
Taking in  
the day-  
time pro-  
perty to the  
value of 5s.  
in a house,  
&c. no per-  
son being  
therein,  
felony  
without  
clergy.

3 W. and  
M. c. 9. s.  
1. As to  
aiders and  
abettors,  
and acces-  
sories.

\*The statute then enacts, "that if any person or persons shall be found guilty and convicted by verdict, confession, or otherwise, according to the laws of this realm, for the felonious taking away, in the day-time, of any money, goods or chattel, being of the value of five shillings or upwards, in any dwelling-house or houses, or any part thereof, or any outhouse or outhouses, belonging and used to and with any dwelling-house or houses, although no person shall be in the said house or outhouses at the time of such felony committed ;" such person and persons shall not be admitted to the benefit of clergy.

The 3 W. and M. c. 9. s. 1. enacts, that "every person or persons that shall comfort, aid, abet, assist, counsel, hire, or command any person or persons to break any dwelling-house, shop, or warehouse thereunto belonging, or therewith used, in the day time, and feloniously take away any money, goods, or chattels, of the value of five shillings or upwards therein being, although no person shall be within such dwelling-house, shop, or warehouse," being convicted, shall not have the benefit of clergy.

A breaking Though the words of the enacting part of the statute of

x 2 East. P. C. c. 16. s. 70. p. 634. Ante 968.

y 2 Hale 345, 6, 7. Fost. 330. 2 East.

P. C. c. 16. s. 68. p. 631, s. 73. p. 637. s. 76. p. 639, 640. 6 Ev. Col. Stat. Pt. V. Cl. VII. No. 17. p. 471, note (7) Post. 974.



Elizabeth seem plainly to include felonious takings to the value of five shillings, though not committed with force, yet as the mischief complained of in the preamble, and intended to be prevented, is stated to be, heinous robberies committed "in breaking and entering" houses, and as other statutes excluding the benefit of clergy from robberies in houses have been construed to extend to such larcenies only as are accompanied with a breaking of the house, it has been holden that this statute also extends only to such a felonious taking as is accompanied with a breaking of the house. (x) And with respect to the nature of the breaking, it seems to be the better opinion, that it must be such as would make burglary if it were done in the night; and that \*no act of violence short of this will be sufficient. (a) It was indeed said by a very great judge, (b) that though the breaking the door of a cupboard let into the wall of a house into which the thief had entered by an open outer door or window, would not constitute burglary, yet that it would be a sufficient breaking within this statute; and he cites a case in support of this distinction, which goes to the extent of making the breaking open a chest in the house a sufficient breaking. (c) But this doctrine has been observed upon by Mr. J. Foster, who thinks that no act of violence short of a common law burglary will be sufficient upon the statute of Elizabeth, or the statute 1 Edw. 6. c. 12.; and as to the case cited, he says, that it does not warrant the distinction; that if the chest mentioned in it was a moveable chest, it cannot be law; and that from other statements of the case, (d) it did not, nor possibly could, turn upon the circumstance of breaking a chest, or fixed cupboard, or any thing like it, as there was no occasion to resort to any such constructive breaking, both the outer and inner doors having been broken open. (e)

of the house is necessary, under the statute 39 Eliz. c. 15.

[\*973]

It seems that questions which may arise upon this statute as to what shall be deemed a *dwelling-house*, must be governed by the same rules as apply to similar questions in the case of burglary. (f) Thus, according to those rules, it appears to have been holden that a chamber in one of the inns of court is a dwelling-house within the statute. (g) The express words of the statute extend also to any *out-house* belonging to and used with the dwelling-house: and according to the rule that a statute taking away clergy from \*the accessory before, does by necessary consequence take it away also from the principal, the statute 3 W. and M. c. 9. s. 1. by taking away cler-

As to what shall be deemed a dwelling-house, out-house, &c.

[\*974]

x 2 Hawk. P. C. c. 33. s. 96. 2 Hale 356.  
a 1 Hale 526. 2 Hale 356, 357. 1 Hawk.  
P. C. c. 34. s. 3. East, 103. 2 East. P. C. c.  
18. s. 7. p. 63. Bynnes's case, Popph. 84.  
appears to have proceeded upon a different  
construction, but it has been denied to be  
law. Kel 68.  
b 12. 4 Hale

c 1 Hale 527. citing Simson's case, *Id. ibid.*  
and 508, 524, 528.  
d 2 Hale 358. Kel. 31.  
e East, 103, and see 2 Hale 358, note (h),  
*Ante*, 905.  
f *Ante*, 914, *et sequ.*  
g Evans and Fynche (case of) Cro. Car.  
479. *Ante*, 914.

gy from the accessory before, where the breaking, &c. is committed in a shop or warehouse belonging to and used with the dwelling-house, also takes it away from the principals in such offence, though the shop or warehouse may not come under the description of an outhouse. (*h*)

Property must be taken to the value of five shillings.

There must be an actual stealing or taking away of money, goods, or chattels, to the value of *five shillings*. It is not however necessary, that the property should be carried out of the house: the least removal of it is sufficient, as in the case of other larcenies. (*i*) Thus, where the thief took goods to the value of five shillings out of a chest, and laid them on the floor, but was apprehended before he could carry them out of the house, the case was holden to be within the statute, as there was a sufficient asportation to constitute a larceny at common law: and the statute does not alter the nature of the offence, but only takes away clergy from the particular species of larceny described. (*k*)

No person must be in the house at the time of the offence.

It is necessary by the express words of the statute, that no person should be in the house at the time when the offence is committed. Accordingly where the prisoner, having entered by an open outer door, broke open the door of a room above stairs and stole goods, while a person was in a room below, the case was holden not to be within the statute. (*l*) And it follows that a larceny committed in a lodging, which is not a mansion or dwelling-house of itself, will not be within the statute, if any person were, at the time, \*in the house of which such lodging is a part. (*m*) But if the person in the house conspire with the thief, the statute will nevertheless apply. Thus, where it appeared that the prisoners were let into the house by a servant, and that they afterwards broke open some inner doors, and stole a great deal of property; an objection that the servant was in the house at the time was overruled, upon the ground that a house with so treacherous a servant in it, was as defenceless as if no person whatever had been therein. (*n*)

Of aiders and abettors. The 39 Eliz. c. 15. extended by 3 W. and M. c. 9.

By the construction which was put upon this statute of Elizabeth, and which appears to have proceeded upon the particular wording of it, *aiders and abettors*, not actually entering the house, were holden not to be within its provisions, so as to be ousted of clergy. (*o*) Accordingly, where two persons put a ladder against a chamber window, and one of them opened the window, got into the chamber, and stole a

*h* 2 Hale 346, 347. Fost. 330, *et sequ.*  
2 East. P. C. c. 16. s. 68. p. 631. s. 73. p. 637.  
s. 76. p. 640. *Ante*, 971.

*i* 1 Hale 526. 1 Hawk. P. C. c. 34. s. 4.  
2 East. P. C. c. 16. s. 75. p. 629.

*k* Simson's case, Kel. 31. 2 Hale 357, 353.  
1 Hawk. P. C. c. 34. s. 4. Fost. 109. 2 East.  
P. C. c. 16. s. 75. p. 639.

*l* Harding's case, O. B. 1699, 1 Hawk. P.

C. c. 34. s. 9.

*m* 1 Hawk. P. C. c. 34. s. 8.

*n* Smith's case, O. B. 1693, 1 Hawk. P. C.  
c. 34. s. 7. 2 Leuch 563, note (*n*). But *qu.*  
and see the preamble of the statute, *ante*,  
971.

*o* 1 Hale 527, 529, 536. Fost. 356, 418. 2  
Hale 358, 359. 2 East. P. C. c. 16. s. 75. p.  
639.



large sum of money, while the other stood on the ladder, so that he could see into the chamber, and afterwards had a share of the booty; it was holden, that as the person so assisting in the robbery did not actually enter the chamber, he was entitled to his clergy. (*p*) But this construction has been considered as hardly to be reconciled with the admitted rule, namely, that when divers persons are present and abet one another in the commission of any felony, the act of one shall be looked upon as the act of all. (*q*) And in cases of ordinary occurrence, the question will not at this time arise, as the statute 3 W. and M. c. 9. s. 1. expressly provides that the aiders and abettors therein mentioned shall not have the benefit of clergy. (*r*)

\*But some points have been raised upon the construction of the statute 3 W. and M. It has been questioned, whether a person present and aiding at the robbery, but not entering the house, may be indicted as a principal, so as to be ousted of clergy; or whether it is not necessary that he should be indicted as an aider and abettor under this statute. (*s*) In a case, however, where three prisoners were indicted as principals, and it appeared by the evidence that one of them only entered the house while the others waited at some distance in order to receive the goods, an objection that the one who entered could alone be found guilty, seems to have been overruled. (*t*) But as the jury found the value of the property taken in that case to be under five shillings, the point was not further mentioned. Another point which has been made is, that an aider and abettor not actually entering, is not by this statute expressly ousted of his clergy, if the place broken and entered be an *outhouse*, not part of the dwelling-house, and not a shop or warehouse. For though the statute of Elizabeth expressly extends to outhouses belonging to and used with the dwelling-house, that statute, according to the construction which has been put upon it, does not apply to aiders and abettors who do not enter; (*u*) and the statute of 3 W. and M. which applies to such aiders and abettors, says nothing of an *outhouse*, but takes clergy away from aiders and abettors of a breaking, &c. in any “dwelling-house, shop, or warehouse. thereunto belonging,” and does not therefore apply to aiders and abettors of a breaking, &c. in an outhouse, which is no part of the dwelling-house, and not a shop or warehouse. (*w*) It should however be observed, that, in some \*books, the

[\* 976]

Points upon the construction of the 3 W. and M. c. 9. as to aiders and abettors.

[\* 977]

*p* Evans and Fynche (case of,) Cro. Car. 473. *Ante*, 35, 36. The same case is in 1 Jones 394. but this point is not there noticed.

*q* 2 Hawk. P. C. c. 33. s. 95. *ante*, 30, *et sequ.*

*r* *Ante*, 972. The statute 4 and 5 Ph. and M. c. 4. does not apply to the aiders, &c. in the statute of Eliz. as it is restrained by the construction which has been put upon it, to such robberies in dwelling-houses as are ex-

cluded from clergy by some former statute.

*s* 2 East. P. C. c. 16. s. 75. p. 639.

*t* Mouncer and others (case of,) 2 Leach. 567.

*u* *Ante*, 975.

*w* 2 Hawk. P. C. c. 33. s. 100. 2 East. P. C. c. 16. s. 76. p. 639, 640. As to the outhouses which will be considered as part or parcel of the dwelling-house, see *ante*. 917. *et sequ.*

statutes of Eliz., and W. and M. notwithstanding the difference of the terms used in them, have been treated of as co-extensive and co-operating. (*x*) And if the value of the goods stolen amounts to forty shillings, aiders and assisters will be excluded from clergy by the statute 12 Ann. c. 7.

Of accessories before.

It is agreed that *accessories before* were not ousted of their clergy by the statute of Elizabeth. (*y*) But the statute of 3 W. and M. expressly extends to them; (*z*) subject, however, to the observations which have been made in the preceding paragraph, with respect to aiders and abettors of a breaking, &c. in an *outhouse*. For as that statute is the only law by which accessories before are excluded from their clergy, and as it applies only, as we have seen, in its terms, to a breaking, &c. in a “dwelling-house, shop, or warehouse, thereunto belonging,” it has been considered, that accessories before to a breaking in an outhouse, not being any part of a dwelling-house, and not being a shop or warehouse, are still entitled to the benefit of clergy. (*a*)

Indictment.

The indictment upon the statute of Elizabeth ought precisely to pursue the language of the statute. It must state, therefore, that the offence was committed in the day time, and that no person was within the house. (*b*) But there is no occasion to make a formal statement of a robbery, as in an indictment for robbery from the person; for the averment that the party broke and entered the house sufficiently imports a robbery. (*c*)

Evidence and verdict.

[\* 978]

The evidence must support the material averments in the indictment. But if it should appear that the offence was committed in the night, so that it might have been prosecuted as burglary; or that any person was in the house at the time; or that there was no breaking of the house; though the case will not come within this statute, the offender may be convicted of the simple larceny. (*d*)

Besides the cases of house-breaking which have been mentioned in the present chapter, the breaking and entering houses, shops, &c. for the purpose of destroying or injuring articles of manufacture, are in several instances made highly penal by the provisions of certain statutes, which will be mentioned more particularly in a subsequent chapter of this Book.

*x* 4 Black. Com. 240. and 2 MS. Sum. 272. as cited in 2 East. P. C. c. 16. s. 75. p. 639.

*y* 1 Hale 526, 527, 528. 2 Hale 357. 2 Hawk. P. C. c. 33. s. 98.

*z* *Ante*, 972.

*a* 2 Hawk. P. C. c. 33. s. 101. 2 East. P. C. c. 16. s. 76. p. 640.

*b* Poulter's case, 11 Co. 36. 1 Hale 525.

1 Hawk. P. C. c. 34. s. 5.

*c* 2 Hale 356, 357.

*d* 1 Hale 525, 526. 2 Hale 356. 1 Hawk. P. C. c. 34. s. 6. 2 East. P. C. c. 16. s. 77. p. 640. And it should seem that the offender may be convicted of a capital offence, under the statute of Anne, if the stealing were to the amount of forty shillings.

## \*CHAPTER THE FOURTH.

*Of Robbery and Larceny in a Dwelling-House, where there is no Breaking of the House.*

**ROBBERY** and larceny in a dwelling-house have been considered by the legislature as aggravated offences; though effected without any *breaking* of the house. These offences have therefore been made subject to capital punishment; first where, at the time the property is stolen from the house, the owner or any other person is therein and put in fear; and, secondly, where the property stolen in the house, or any of its outhouses, is of the value of forty shillings; and this whether any person be within or not. Before these statutes are treated of it may be shortly observed, that property may, it should seem, be considered as stolen from a dwelling-house, as well where a delivery of the thing out of the house is obtained by any artifice from a person therein at the time, as where the thief himself enters the house, and takes it there. (a)

The statute 3 W. and M. c. 9. s. 1. relates to the first of these offences. It enacts "that every person that shall feloniously take away any goods or chattels, being in any dwelling-house, the owner or any other person being therein, and put in fear, or shall comfort, aid, abet, assist, \*counsel, hire, or command, any person or persons to commit the said offence," being convicted, &c., shall not have the benefit of clergy.

3 W. and M. c. 9. s. 1. Stealing property from a dwelling-house, any person being therein, and put in fear.

It is clear that no *breaking* of the house is necessary to constitute the offence under this provision of the statute; and that the meaning of the word, dwelling-house, must be construed by reference to the same rules as prevail in the case of burglary. (b) But questions of greater doubt have been raised upon its construction, with respect to the necessary value of the property taken, and also with respect to the degree of fear which must be excited by the thief.

Construction of this statute.

Upon the first of these questions, it may be sufficient to observe that though there seems to be good ground for contending that stealing property of ever so small value, in a dwelling-house, and putting some person in the house in fear by so doing, constitutes this offence, in its full aggravation, although the property be not taken in the presence of the party put in fear; yet it seems that by the usual interpreta-

As to the value of the property taken.

<sup>a</sup> 2 East. P. C. c. 16. s. 55. p. 623. And see Pearce's case, *id.* s. 39. p. 603, where the prisoner, intending to steal the mail bags, went to the post-office; and, pretending to be the guard of the mail, procured the bags to be let down to him out of the window by a

string: and the Judges considered that this artifice in obtaining the delivery of the letters in the bags out of the house was the same as if the prisoner had actually taken them out himself.

<sup>b</sup> 2 East. P. C. c. 16. s. 69. p. 633.

tion and construction upon this subject, the value of the property taken must exceed twelvepence, (the value necessary to constitute grand larceny) unless it were taken in the actual presence of some person in the house, so as to amount to a robbery properly so called. (c)

As to the degree of fear which must be excited.

[\* 981]

With respect to the degree of fear which must be excited by the thief, it does not appear to have been expressly decided whether or not it be necessary to prove the actual sensation of fear felt by some person in the house, or whether fear will be implied if some person in the house were conscious of the fact at the time of the robbery. But perhaps it may be stated as the better opinion, and it is said to be the practice, that proof should be given of an actual fear excited by the fact when committed out of the presence of the party, so as not to amount to a robbery at common law. (d) Where the fact was committed in the presence of the party, possibly it would depend upon the particular circumstances of the transaction, whether fear would or would not be implied: and clearly if it should appear that the party in whose presence the property was taken was not conscious of the fact at the time, the case would not come within the statute. (e)

The indictment must allege that some person in the house was put in fear.

It has been decided that an indictment upon this statute must expressly allege that some person in the house was put in fear by the prisoner. The form was (after stating a stealing of goods in the dwelling-house of one J. G.,) "he the said J. G., and one M. E., and one M. G., the wife of the said J. G., then being in the said dwelling-house, and being put in fear therein;" and, on the first consideration of the case, most of the Judges, to whom it was referred, inclined to think that the indictment was good, in pursuing the words of the statute; but they ultimately agreed that the prisoners were entitled to their clergy for the defect in the indictment, in not stating that the persons in the house were put in fear *by the prisoners*. (f)

But in this case the judges held, that the prisoners were properly convicted of the larceny; and they accordingly received sentence of transportation. (g)

[\* 982]

12 Ann. c. 7. s. 1.

\*The 12 Ann. c. 7. s. 1. relates to the offence of stealing property in a dwelling-house, or any of its outhouses, of the value of forty shillings. It enacts that "every person who

c 2 East. P. C. c. 16. s. 70. p. 633, 634.

d 2 East. P. C. c. 16. s. 71. p. 635. and Etherington and Brook (case of), *id. ibid.*

e *Id. ibid.*

f Etherington and Brook (case of), 2 Leach 671. 2 East. P. C. c. 16. s. 71. p. 635, in which last authority it is said, that the Judges came to their conclusion, upon being referred to some precedents of indictments for burglary, in which, to oust the offenders of

their clergy in case of their standing mute or challenging more than twenty, they were charged with putting persons in fear who were in the houses, (within 1 Edw. VI. c. 12.) and also to some other books and precedents. See precedents of indictments drawn in conformity to this decision in 2 Stark. Crim. Plead. 444. 3 Chit. Crim. L. 994.

g 2 Leach 673.

shall feloniously steal any money, goods, or chattels, wares, or merchandizes, of the value of *forty shillings*, or more, being in any dwelling-house, or outhouse thereunto belonging, although such house or outhouse be not actually broken by such offender, and although the owner of such goods, or any other person or persons, be or be not in such house or outhouse; or shall assist or aid any person or persons to commit any such offence," being convicted, &c., shall be debarred from the benefit of clergy. The second section provides that the act shall not extend "to apprentices under the age of fifteen years who shall rob their masters as aforesaid." And the act does not extend to principals outlawed, nor to accessories before the fact.

Stealing property in a dwelling-house or outhouse of the value of *forty shillings*.

With respect to the "dwelling-house," as mentioned in this statute, it appears that it must be one in which burglary may be committed. (*h*) But it has been holden that the statute does not extend to a stealing in a man's own house; on the ground that it was not intended to protect property which might happen to be in a house from the owner of the house, but from the depredations of others. (*i*) And, upon the same principle, where it appeared that the prisoner was a married woman and had stolen the property in the dwelling-house of her husband, it was holden that she could not be convicted of the capital part of the charge, as the house of the husband must be construed to be her house also: and she was therefore found guilty only of the simple larceny. (*k*) With respect to *servants*, the preamble \*of the statute which recites "that divers wicked and ill-disposed *servants*, and other persons, are encouraged to commit robberies in houses," shews clearly that it extends to them.

Construction of the statute.

[\* 983]

It appears to have been holden, that the stealing must be of property *deposited in the house*, and not of property which was about the person of the party from whom it was taken. In a case where the indictment was for stealing a bank-note of the value of 25*l.*, in the dwelling-house of one C. M. Adams. it appeared that the prisoner was a lodger in Mrs. Adams's house, and that, on the day on which the offence was committed, she, wanting to get the note changed, sent her servant with it to his apartments, to request him to give her change for it; when the prisoner, after examining his purse, and saying that he had not gold enough about him for the purpose, but that he would go to his bankers and get it changed, left the house with the note in his hand, and never returned. Upon these facts a question arose, whether

The stealing must be of property deposited in the house, and under its protection, & not of property which was about the person of the party from whom it was taken.

*h* 2 East. P. C. c. 16. s. 81. p. 644. Davies's *alias* Silk's case, *ante*, 923, 4; and other cases cited in the Chapter on *Burglary*, *ante*, 913, *et sequ.*

*i* Thompson and Macdaniel (case of), O. B. 1784. 1 Leach 338. 2 East. P. C. c. 16.

s. 81. p. 644.

*k* Gould's case, O. B. 1780. 1 Leach 217. 2 East. P. C. c. 16. s. 81. p. 644, in which last book it is said, that the prisoner was the mistress of a brothel, and stole the money from a sailor who lodged in her husband's house.

the case was within the statute, which was considered as having been made to protect such property as might be *deposited in the house*, and not property which was on the person of the party: and the point having been saved for the opinion of the Judges, they were of opinion that the case was not within the statute. (l) And, upon the same principle, where a person, in possession of a large sum of money, was deluded by a ring-dropper, who pretended to have found a purse, to go into a public-house to share its contents, and there induced to lay his money on the table, when the ring-dropper immediately took up the money, and carried it off, it was decided, upon reference to the Judges, that the case was not within the statute. A majority of them were of

[\* 984] \*opinion that, in order to bring a case within this statute, the property stolen must be under the protection of the house, and deposited therein for safe custody, as the furniture, plate, or money kept in the house, and not things immediately under the eye, or personal care of some one who happens to be in the house. (m)

The stealing of bank-notes, is within the statute.

It appears to have been ruled, at one time, that the stealing of *bank-notes* was not within this statute; on the ground that the legislature could not, in the twelfth year of the reign of Queen Anne, have in contemplation a species of property which it was not a felony to steal until made so by a subsequent statute 2 Geo. II. c. 25. (n) But a contrary doctrine is now fully established, and the stealing of *bank-notes* has been taken in many subsequent cases to be within the statute of Anne, which was intended to protect every species of property. (o)

The stealing must be to the amount of forty shillings at one time.

The stealing must be to the amount of forty shillings *at one time*; for it is the rule that a number of distinct grand larcenies cannot be added together, so as to constitute a capital offence. Thus, where the evidence was that the prisoner was the servant of the prosecutor, and had, at different times, purloined his master's property to a very considerable amount, but it did not appear that he had even taken to

[\* 985] \*the amount of forty shillings at any one particular time; the court held that the case was not within the statute. They said, that the property must be stolen to the amount of forty shillings at one and the same time; and that the several values of different portions of property, stolen at different

l Campbell's case, O. B. Jan. 1792. 2 Leach 564. 2 East. P. C. c. 16. s. 82. p. 644, 645.

m Owen's case, O. B. 1792. 1 Hawk. P. C. s. 38. *Of Larceny from the Dwelling-House*, s. 6. 2 Leach 572. 2 East. P. C. c. 16. s. 82. p. 645. And the same point was again decided in Castledine's case, O. B. Octob. 1792, which was also referred to the Judges; and again in Watson's case, O. B. 1794. See 2 Leach 574, note (a): 2 Leach 640: 2 East. P. C. c.

16. s. 82. p. 645, 646, and s. 107. p. 680, 681 - n Dunmow's case, *Essex Ass.* 1793, *cor-Hotham, B.* 1 Hawk. P. C. c. 36. *Of Larceny from the Dwelling-House*, s. 7.

o Dean's case, 1796. 2 Leach 693. 1 East. P. C. c. 16. s. 83. p. 646. Campbell's case, 1792, *ante*, note (l). Watson's case, 1794, *ante*, note (m). Milne's case, 2 East. P. C. c. 16. s. 37. p. 602. Hammond's case, 2 Leach 1033, 1090.



times, cannot be added together for the purposes of making the offence capital, they being in fact different and independent acts of stealing. (*p*) But where property was stolen at one time to the amount of forty shillings, and a part of it only, not amounting to forty shillings, was found upon the prisoner, and produced at the trial, the court left it to the jury to say whether the prisoner had not stolen the rest of the things which the prosecutor lost, as well as those which had been produced. (*q*)

We have seen that the dwelling-house in which the stealing takes place, must be one in which burglary may be committed; (*r*) and it is also necessary, as in cases of burglary, that the name of the owner of the house should be correctly stated in the indictment; as a material variance in this respect will be fatal to the capital part of the charge. Thus, where the indictment stated the dwelling-house to belong to one *John Snoxall*, and upon the evidence it appeared that it was not his house; it was holden that the prisoner could not be convicted upon this statute: (*s*) and it was holden to be a variance fatal to the capital part of the indictment, where the house was stated to belong to *Sarah Lunns*, and it appeared on the evidence that the proper name was *Sarah London*. (*t*)

The indictment must state the name of the owner of the house correctly

It should be observed, that if a prisoner be indicted for \*robbery in the house, or burglary and stealing of goods, and the evidence prove a larceny committed in the dwelling-house to the amount of forty shillings, he may be acquitted of the robbery and burglary, and found guilty on this statute, although there be no special count upon the statute in the indictment. (*u*)

A prisoner [\* 986] indicted for burglary, &c. may be found guilty upon this statute, &c.

## \*CHAPTER THE FIFTH.

[\* 987]

### *Of Robbery from the Person. (1)*

**ROBBERY** from the person appears to be well defined as a felonious taking of money or goods of any value from the

Definition of the offence.

*p* Petrie's case, 1 Leach 294.

*q* Hamilton's case, 1 Leach 348. The jury found the prisoner guilty of stealing goods in the dwelling-house to the value of forty shillings.

*r* *Ante*, 982.

*s* White's case, 1 Leach 252, *ante*, 949.

*t* Woodward's case, 1 Leach 253, note (*a*), and see other cases, *ante*, 949.

*u* 1 Hawk. P. C. c. 36. *Of Larceny from the Dwelling-House*, s. 3. and see *ante*, 956, 957.

(1) MASSACHUSETTS.—Robbery was always punished as a capital offence in this State, until the passing of the Statute of 1804, Chap. 143, by which the punishment was reduced to hard labour for life. This statute remained



person of another, or in his presence, against his will, by violence, or putting him in fear." (a)

This offence is ex- This offence is an aggravated species of larceny, (b) and liable to capital punishment, being excluded from clergy by

a 2 East. P. C. c. 16. s. 124. p. 707. Inst. 68.  
Hickman's case, 1 Leach 280. 4 Black. Com. b Peat's case, 1 Leach 228. Lapier's case, 243. 1 Hawk. P. C. c. 34. 1 Hale 532. 3 1 Leach 321.

in force until the 19th February, 1819, when Robbery, if committed under certain circumstances of aggravation, was again punished with death. The last mentioned statute is in these words,

Sect. 1. "That if any person shall commit an assault upon another, and shall rob, steal and take from his person, any money, goods, or chattels, or any property which may be the subject of larceny, such robber being, at the time of committing such assault, armed with a dangerous weapon, with intent to kill or maim the person so assaulted and robbed; or if any such robber, being armed as aforesaid, shall actually strike or wound the person so assaulted and robbed, every person so offending, and every person present, aiding and abetting in the commission of such felony, or who shall be accessory thereto before the fact, by counselling, hiring, or procuring the same to be done and committed, and who shall be duly convicted thereof, shall suffer the punishment of death:" The third section of this statute enacts, "that if any person being armed with a dangerous weapon, and with intent to commit murder or robbery, shall assault another," shall be punished by solitary imprisonment not exceeding one year, and by confinement afterwards to hard labour not exceeding twenty years. And the same punishment is extended to persons present aiding and abetting, &c. and to accessories before the fact.

A larceny committed either with actual force and violence, or with a constructive force, by an assault and putting in fear, is a robbery; and in an indictment for such offence an allegation of force and violence is sufficient, without alleging that the party robbed was put in fear. *Commonwealth v. Humphries*, 7 Mass. Rep. 242. In this case, the allegation, of putting in fear was omitted, this omission occasioned some doubt in the minds of the court, and the justices present thought the prisoner entitled to have the question, as to the validity of the indictment, examined. The court advised upon the question. The prisoner was convicted, and when he was brought up for sentence, Sewall J. delivered the opinion of the court. The statute thus describes the offence; "any person who shall by force and violence, or other assault and putting in fear, feloniously rob, steal, &c." This clause of the statute admits perhaps of some uncertainty in the construction. "Putting in fear, may be so connected with the preceding words, as to become an essential circumstance in describing the offence of robbery, as well when the assault is accompanied with actual force and violence, as when it is by a constructive force, as by menaces; and if putting in fear was essential to an indictment at common law, the words of the statute are not sufficiently explicit to establish a construction, changing the definition of the crime, or the form of the indictment, in this respect." The learned judge then referred to 1 Hawk. P. C. c. 34. 3 Inst. 68. 1 H. H. P. C. 531. *Dyer's Reports*. 224. & 4 Bl. Com. 243 where after giving the definition of robbery, Blackstone says, "that previous violence, or putting in fear, is the criterion that distinguishes robbery from other larceny; and that it is not necessary,

the enactments of several statutes. The 23 Hen. VIII. c. 1. s. 3. enacted, that no person found guilty "for robbing of any person or persons in or near about the highways, nor any person or persons found guilty of any abetment, procurement, helping, maintaining, or counselling of or to any such felony," should be admitted to clergy. (c) The next statute upon this subject, 1 Edw. VI. c. 12. s. 10. enacts, that no person who shall be attainted or convicted "of robbing any person in the highway, or near to the highway,"

<sup>c</sup> But as to this statute, see the remark in 1 East. P. C. c. 16. s. 57. p. 624, that it is much to be doubted, whether it be not repealed as to the point of clergy, by 1 Edw. VI. c. 12. which supplies its place in great

measure; and if so, not revived by 5 and 6 Edw. VI. c. 10. The point, however, appears to be of little consequence at this time, as the statute 3 W. and M. c. 9. s. 1. extends to all cases of robbery.

though usual to lay in the indictment, that the robbery was committed by putting in fear: it is sufficient if it be laid to be done with violence." "This was the opinion of Mr Justice Foster in delivering the opinion of the judges in the cases of McDonald's & al." Foster's Rep. 128. The same was the opinion of the twelve judges in Donally's case 5 Leach's C. L. 299. And Lord Ch. J. Eyre, in his argument of the same case, as reported in East's Crown Law, c. 16. s. 127, 130, 167, says that in the old precedents of indictments for robbery, the putting in fear is not alleged. The result of this inquiry is, that we are not restrained by the common law definition of robbery, or by any precise form of the indictment, as to the circumstance in question. And without departing from any established principle, the construction may be, what the words cited (from the statute) certainly admit, that a larceny committed with actual force and violence, or by a constructive force by an assault and putting in fear, is to be adjudged a robbery: and that in this respect, the statute has preserved the definition of the crime, as it was described and punished by the common law."

A recent case in Middlesex, which was the first that occurred after the passing of the late statute of 19th Feb. 1819, produced an important exposition and construction of that statute. The Commonwealth v. Michael Martin, 17 Mass. Rep. 539 is the case alluded to; in which it was decided by the unanimous opinion of the whole court, that to make robbery a capital offence within the first section of the statute, it is sufficient if the party be armed with a dangerous weapon, with intent to kill or maim the person assaulted, in case such killing or maiming be necessary to his purpose of robbing and that he have the power of executing such intent. The prisoner was indicted upon the first clause of the first section of the statute, for the robbery of John Bray, "being then and there at the time of committing the assault aforesaid, in manner and form aforesaid, armed with a certain dangerous weapon called a pistol, with intent him the said John Bray, then and there to kill and maim." The defence set up was, that to constitute the crime of robbery a capital offence within the statute, it must be proved that there was an absolute intent to kill or maim the party robbed, at all events, whether the robbery could be accomplished without killing or maiming, or not, and that in the present case, the fact of the prisoner's having left the party robbed, without killing or maiming him, or making an actual attempt to do it, proved that there was no such intent, as was by the statute, constituted an essential ingredient in the capital offence. This construction of the statute was not

[\* 988] shall be admitted to the benefit of clergy. These statutes applied only to the offence when committed in or near the highway; and many cases occurred, in which the question, as to what should be considered as a robbery in or \*near the king's highway, was considered as one of much nicety and difficulty: but a later statute renders such inquiries unnecessary, as it is so generally worded as to include all sorts of robbery, either in a highway, house, or elsewhere. This statute is the 3 W. and M. c. 9. s. 1., which enacts, that "all and every person or persons that shall rob any other person, or shall comfort, aid, abet, assist, counsel, hire, or command, any person or persons to commit the said offence," being convicted, &c. shall not have the benefit of clergy.

Accessories before excluded from clergy, but not

With respect to accessories before the fact, the 4 and 5 Ph. and M. c. 4. s. 1. enacts, that "every person who shall maliciously hire, command, or counsel, any person or persons to commit or do any robbery in or near the highway," being

adopted by the court, but they instructed the jury, that if they were satisfied from the evidence, that the prisoner armed himself with a loaded pistol, with intent to kill or maim the party whom he should rob, if such killing or maiming were necessary for his purpose of robbing; and that, when he assaulted and robbed Major Bray, he had the power of executing such intent, and meant to do it, if he could not otherwise rob him, the offence was capital according to the statute; and they accordingly found the prisoner guilty. See the opinion of the court at large, delivered by Parker C. J. in which the above construction of the statute is unanswerably maintained.

PENNSYLVANIA.—To constitute robbery, there must be a felonious taking of property from the person of another by force either actual or constructive; but if force be used, it is not essential that the prosecutor should be either aware, or afraid of the taking. Hence, when the prisoner took the prosecutor by the cravat, with an intention to steal his watch, and also pressed his breast against the prosecutor's and held him against a wall, during which time he took the prosecutor's watch from his fob, without his knowledge, and without his suspecting any intention of felony, this was held to be robbery. So decided upon special verdict, in the case of the Commonwealth v. Snelling 4 Binn. 379. in which case it was observed among other things by Tilghman C. J. "if a man is knocked down and rendered senseless, and in that situation his money is taken without his knowledge, it shall not avail the thief to say, that it was not taken against the consent of the man, whom he had rendered incapable of exercising the faculty of volition." "Fear is not an essential ingredient of robbery; force is sufficient." See ante, Commonwealth v. Humphries, 7 Mass. Rep. 242.

To constitute the crime of robbery, it is not necessary that the taking should be from the person of the owner; it is sufficient if it be done in the presence of the owner; as if by intimidation he is compelled to open his desk, or to throw down his purse, and then the money is taken in his presence. Wharton's Dig. 151. United States v. Jones, C. C. April 1813, cited by Wharton from MS. Reports.

UNITED STATES.—For the Statute of the United States against Robbery of the carrier of the mail of the United States, see Ing. Dig. 687. 688.

outlawed, found guilty, &c. shall not have the benefit of accessories after. clergy. (*d*) The later statute, 3 W. and M. c. 9., extends, by the express words of it, to accessories before the fact. But accessories after the fact, in robbery, are not excluded from clergy. (*e*)

Recurring to the foregoing definition of this offence, we may inquire, first, as to the felonious taking; secondly, as to the taking against the will of the party; and, thirdly, as to the violence, or putting in fear.

### I. As to the felonious taking.

The taking may be of money or goods "of any value." The value, therefore, of the property taken is quite immaterial: a penny as well as a pound, forcibly extorted, makes a robbery; the gist of the offence being the force and terror. (*f*) \*But something must be taken, and it must be of some value; (*g*) otherwise the offence will be only that of an assault with intent to rob. (*h*)

Of the felonious taking.

Amount of the value of the property immaterial. [\* 989]

The property taken must not only be of some value, but it must be taken from the peaceable possession of the owner. In a case where the prisoner had obtained a note of hand from a gentleman by threatening with a knife held to his throat to take away his life; and it appeared that she had furnished the paper and ink with which it was written, and that the paper was never out of her possession; it was holden not to be robbery. The Judges were of opinion that the note was of no value; that as the legislature at the time of passing the statute 2 Geo. II. c. 5. s. 3. whereby the stealing a chose in action was made felony, could not possibly have a case like this in contemplation, it was not within that act of parliament; that the note did not, on the face of it, import either a general or a special property in the prosecutor; and that it was so far from being of any the least value to him, that he had not even the property of the paper on which it was written, as it appeared that both the paper and ink were the property of the prisoner, and the delivery of it by her to the prosecutor could not, under the circumstances, be considered as vesting it in him; but that if it had, as it was a property of which he was never, even for an instant, in the peaceable possession, it could not be considered as property taken from his person, so as to constitute the crime of robbery. (*i*)

But it must be of some value, and taken from the peaceable possession of the owner.

*d* See, as to the construction of this statute with respect to accessories to robberies in dwelling-houses, that it is restrained to such robberies of that kind as are excluded from clergy by some former statute, *ante*, 975, note (*r*).

*e* 2 Hale 350.

*f* 3 Inst. 69. 1 Hale 532. 1 Hawk. P. C. c. 31. s. 16. 4 Black. Com. 243. 2

East. P. C. c. 16. s. 125. p. 707.

*g* Phipoe's case, 2 Leach 673. 980.

*h* *Ante*, 880, *et sequ.*

*i* Phipoe's case, 2 Leach 673. The form of the note was—"Two months after date I promise to pay to Miss Maria Theresa Phipoe, or order, the sum of two thousand pounds sterling, for value received.—John Courtoy, Oxendon-street."

The taking must be such as to give the [\* 990] robber a possession of the thing taken.

By the "taking" necessary in this offence, is implied that the robber must be in possession of the thing taken. So that if a man, having a purse fastened to his girdle, be assaulted by a thief, and the thief, in order the more easily to take the purse, cut the girdle, and the purse thereby fall to the ground, this is no taking; for the thief never had the purse in his possession. (*k*) And, upon the same principle, in a case where it appeared that the prisoner stopped the prosecutor as he was carrying a feather-bed on his shoulders, and told him to lay it down or he would shoot him, and the prosecutor accordingly laid the bed on the ground, but the prisoner was apprehended before he could take it up so as to remove it from the spot where it lay; the Judges were of opinion that the offence of robbery was not completed. (*l*) But if in the former case the thief had taken up the purse from the ground, and afterwards let it fall in the struggle, this would have been a taking, though he had never taken it up again; for the purse would have been once in his possession. (*m*) And it is not necessary that the property should continue in the possession of the thief. Thus, where a robber took a purse of money from a gentleman, and returned it to him immediately, saying, "If you value your purse, you will please to take it back, and give me the contents of it;" but was apprehended and secured before the gentleman had time to give him the contents of the purse; the court held that there was a *sufficient taking* to complete the offence, although the prisoner's possession continued only for an instant. (*n*) And in a case where, while a lady was stepping into her carriage, the prisoner snatched at her diamond ear-ring, and separated it from her ear by tearing the ear entirely through; but there was no proof of the ear-ring ever having been seen in his hand, and, upon the lady's arrival at home, it was found amongst the curls of her hair; the Judges, upon the case being submitted for their consideration, were all of opinion, that there was a *sufficient taking* from the person to constitute robbery. They thought that it was sufficient, as the ear-ring was in the possession of the [\* 991] prisoner separate from the lady's person, though but for a moment, and though he could not retain it, but probably lost it again the same instant. (*o*) It should however, be observed, with respect to cases of this description, that though it may have been formerly holden that a sudden taking or snatching of any property from a person unawares was sufficient, the contrary doctrine appears to be now established; and that no taking by violence will, at the present day, be considered as sufficient to constitute robbery, unless some

*k* 3 Inst. 69. 1 Hale 533.

*l* Farrell's case, O. B. 1787, 1 Leach 322. note (*b*).

*m* 3 Inst. 69. 1 Hale 533.

*n* Peat's case, 1 Leach 228.

*o* Lapier's case, 1 Leach 320.



injury be done to the person, as in the case last cited, or unless there be some previous struggle for the possession of the property. (*p*)

Where the offence of robbery is once actually completed by taking the property of another into the possession of the thief, it cannot be purged by any subsequent re-delivery. (*q*) Thus, if A. requires B. to deliver his purse, and he delivers it accordingly, when A., finding only two shillings in it, gives it him again, yet this is a *taking* by robbery. (*r*)

Not only a taking in fact, but a taking in law, is sufficient to constitute a robbery. (*s*) It has therefore been holden, that if thieves attack a man to rob him, and, finding little or nothing about him, force him by menace of death to swear to fetch them money, which he does accordingly, and delivers it to them while the fear of the menace still continues upon him, and they receive it, this is a sufficient taking in law. (*t*) And if upon A. assaulting B., and bidding him to deliver his purse, B. refuse to do so, and then A. pray B. to give or lend him money, and B. does so accordingly under the influence of fear, the taking will be complete. (*u*) For \*where the thief receives money, &c. by the delivery of the party, either while the party is under the terror of an actual assault, or afterwards while the fear of menaces made use of by the thief continues upon him, such thief may, in the eye of the law, as correctly be said to take the property from the party, as if he had actually taken it out of his pocket. (*w*)

There may be a taking in law.

[\* 992]

The taking must in all cases be accompanied with a felonious intent, or *animus furandi*: but if a man *animo furandi* say—"Give me your money,"—"Lend me your money,"—"Make me a present of your money," or words of the like import, they are equivalent to the most positive order or demand; and, if any thing be obtained in consequence, such a taking will be within the definition of robbery. (*x*) There is, however, a case of considerable nicety, which should be here noticed, where, though the original assault was clearly with a felonious intent, the taking of the goods was holden to be no more than a trespass. A. assaulted B. on the highway with a felonious intent, and searched the pockets of B. for money; but, finding none, he pulled off the bridle of B.'s horse, and threw that and some bread which B. had in pannels about the highway, but did not take any

But there must be the *animus furandi*, or felonious intent.

*p* Macauley's case, O. B. 1783, 1 Leach 287. Baker's case, O. B. 1783, *id.* 291. Horner's case, O. B. 1790, 2 East. P. C. c. 16. 121. p. 703. *post.* 997.

*q* 1 Hawk. P. C. c. 34. s. 2.

*r* 1 Hale 533.

*s* 3 Inst. 68. 1 Hale 532.

*t* *Id.* *Ibid.* 2 East. P. C. c. 16. s. 129. p. 714.

*u* 1 Hale 533.

*w* 2 East. P. C. c. 16. s. 128. p. 711. s. 129. p. 714. And see further as to cases of this kind, *post*, 1002, *et sequ.* where the "putting in fear" is spoken of.

*x* By Willes, J. delivering the opinion of the Judges in Donally's case, 1 Leach 196. And see further upon the subject of the felonious intent, *post*, 996, *et sequ.* in the cases relating to "violence or putting in fear;" and *post*, in the Chapter on *Larceny*.

thing from B.; and it was resolved, upon a conference with all the Judges, that this was not robbery, because nothing was taken from B. (*y*) But it is remarked upon this case, that the better reason for the decision seems to be, that the particular goods were not taken with a felonious intent, as surely there was a sufficient taking and separation of the goods from the person. (*z*)

[\* 993] \*Some questions as to the felonious intent have arisen where the property has been taken under the colour of purchase. Thus, though it is clear that if a person by force, or threats, compel another to give him goods, and by way of colour oblige him to take, or if he offer less than the value, it is robbery: (*a*) yet it has been doubted, whether the forcing a higler or other chapman to sell his wares, and giving him the full value of them, amounts to so heinous a crime as robbery. (*b*) So that where a traveller met a fisherman with fish, who refused to sell him any, and he by force and putting in fear took away some of his fish, and threw him money much above the value of it, judgment was respited, because of the doubt whether the intent were felonious on account of the money given. (*c*) It is suggested, however, with much reason, that questions of this kind should properly be referred to the consideration of the jury; and that the circumstance of the full value or more being offered at the time should be left to them to shew that the intention of the party was not fraudulent, and so not felonious. (*d*) For though it does not necessarily follow as a conclusion of law, that if the value of the thing taken be offered to be paid at the time, the intent is therefore not felonious; yet it is submitted, that such a circumstance would be pregnant evidence in the negative. (*e*) But cases where the owner is induced to part with his property at less than its value, by fear of the violence of any individual, or of the outrages of a mob, come under a different consideration, and constitute a sufficient taking with a felonious intent. (*f*)

The taking is suffi-

[\* 994] \*Therefore if A., upon being assaulted by a thief, throws his purse or cloak into a bush, and the thief takes it up and carries it away, or if, while A. is flying from the thief, he lets fall his hat, and the thief takes it up and carries it away, such taking being done in the presence of A. will be sufficient. (*h*) So, if the thief having first assaulted A. takes

The taking need not be immediately from the person of the owner: it will be sufficient if it be in his presence. (*g*)

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*y* Anon. O. B. 1698, 2 East. P. C. c. 16. s. 98. p. 662.

*z* 2 East. P. C. 16. s. 98. p. 662.

*a* Rex v. Simons, Cornwall Lent Ass. 1773, 2 East. P. C. c. 16. s. 123. p. 712.

*b* 1 Hawk. P. C. c. 34. s. 14. 4 Black. Com. 244.

*c* The Fisherman's case, York, 26 Eliz. 2

East. P. C. c. 16. s. 98. p. 661, 662.

*d* 2 East. P. C. c. 16. s. 98. p. 662.

*e* *Id. Ibid.*

*f* Post, 1005, et sequ.

*g* 1 Hale 533. 1 Hawk. P. C. c. 34. s. 6. Rex v. Francis, 2 Str. 1015.

*h* 3 Inst. 68. 1 Hale 533.



away his horse standing by him; or, having put him in fear, drives his cattle, in his presence, out of his pasture; he may be properly said to take such property from the person of A., for he takes it openly and before his face while under his immediate and personal care and protection. (i) But it is clear, that the property must be taken in the presence of the owner. And where it appeared, upon a special verdict, that some thieves gently struck the prosecutor's hand, whereby some money, which he had taken out from his pocket to give change, fell to the ground, and that, upon his offering to take it up, the thieves threatened to knock his brains out, upon which he desisted from taking up the money, and the thieves "then and there immediately" took it up; a great majority of the Judges held, that even by this statement it was not sufficiently expressed in the special verdict that the thieves took up the money in the sight or presence of the owner, and that they could not intend it, though there seemed to have been evidence enough to have warranted such a finding. (k) In a case where robbers, by putting in fear, made a waggoner drive his waggon from the highway in the day-time, but did not rob the goods till night, much doubt appears to have been entertained; some having holden it to be a robbery from the first force, but \*others having considered that the waggoner's possession continued till the goods were actually taken, unless the waggon were driven away by the thieves themselves. (l)

It may also be observed, with respect to the taking, that it must not, as it should seem, precede the violence or putting in fear; or rather, that a subsequent violence or putting in fear will not make a precedent taking, effected clandestinely, or without either violence or putting in fear, amount to robbery. Thus, where a thief clandestinely stole a purse, and, on its being discovered in his possession, denounced vengeance against the party if he should dare to speak of it, and then rode away, it was holden to be simple larceny only, and not robbery, as the words of menace were used after the taking of the purse. (m) But if the purse had been obtained by means of the menace, the offence would have amounted to robbery. (n)

[\* 995]

And the taking must not precede the violence, or putting in fear.

## II.—The second subject of consideration, in following the Of the pro-

i *Id. Ibid.* and 1 Hawk. P. C. c. 34. s. 6.  
 Black. Com. 243.

k *Rex v. Francis*, 2 Str. 1015. *Rex v. Grey and others*, 2 East. P. C. c. 16. s. 126. p. 708. S. P. In *Rex v. Francis* the Judges clearly thought it a case of grand larceny, and therefore would not discharge the prisoners, but directed a new indictment to be preferred, considering themselves confined to the doubt of

the jury, whether there was a sufficient taking, and that they could not give judgment for a larceny.

l 2 East. P. C. c. 16. s. 126. p. 707, 708.

m *Harman's case*, 1 Hale 534. 1 Hawk. P. C. c. 34. s. 7.

n By Lord Mansfield in *Donally's case*, 2 East. P. C. c. 16. s. 130. p. 726.

party being  
taken  
against the  
will of the  
party.

definition of this offence, is as to the taking “against the will” of the party.

[\* 996]

In a case where the party upon whom the robbery was alleged to have been committed consented to the fact for a base purpose, it was holden to be no robbery. One Salmon and several others, in order to obtain for themselves the rewards given by act of parliament for apprehending robbers on the highway, concerted a plan by which a robbery might be effected upon Salmon by a person named Blee, who was one of the confederates, and two strangers procured by Blee. It was expressly found that Salmon was a party to the agreement; that he consented to part with his money and goods under colour and pretence of a robbery; and that for \*such purpose, and in pursuance of this consent and agreement, he went to a highway at Deptford, and waited there till the colourable robbery was effected. The Judges were of opinion that, in consideration of law, no robbery was committed upon Salmon; and the reason given was, that his property was not taken against his will. (o)

Of the violence or  
putting in  
fear.

III.—We may now proceed to inquire, as to “the violence or putting in fear.”

The words of the definition, as given at the beginning of the Chapter, are in the alternative, “violence or putting in fear;” and it appears, that if the property be taken by *either* of these means, against the will of the party, such taking will be sufficient to constitute robbery. (p) The principle, indeed, of robbery is violence; but it has been often holden, that actual violence is not the only means by which a robbery may be effected, but that it may also be effected by fear, which the law considers as constructive violence. (q)

[\* 997]

It appears to have been sometimes considered that fear is a necessary ingredient in all cases of robbery, even in those effected by actual violence; (r) but if so, it will be presumed. And there are cases of this description in which fear can hardly be supposed to have existed: as if a man be knocked \*down without previous warning, and stripped of his property while senseless, he cannot with propriety be said to be put in fear; and yet that would undoubtedly be robbery. (s)

Of the

With respect to the degree of actual “violence,” where the

o M'Daniel and others (case of), Fost. 121, 128. The case of Norden, *post*, 1003, was cited on the part of the Crown; but Mr. Justice Foster remarks upon it as distinguishable on many grounds, Fost. 129.

p 2 East. P. C. c. 16. s. 127. p. 703. and the authorities there cited. Fost. 128.

q Donally's case, 1 Leach 196, 197. 2 East. P. C. c. 16. s. 130. p. 727. Reane's case, 2 Leach 619. 2 East. P. C. c. 16. s. 132. p. 735.

r Fost. 128. where the learned writer says, that there are opinions in the books which seem to make the circumstance of fear necessary, but that he had seen a good MS. note of Lord Holt to the contrary, and that he was himself very clear that the circumstance of actual fear at the time of the robbery need not be strictly proved.

s Fost. 128. 4 Black. Com. 244. 2 East. P. C. c. 16. s. 128. p. 711.

taking is effected by that means, it appears to be well settled degree of violence. that a sudden taking or snatching from a person unawares is not sufficient. Thus, where a boy was carrying a bundle along the street in his hand, after it was dark, when the prisoner ran past him and snatched it suddenly away, it was holden that the act was not done with the degree of force and terror necessary to constitute robbery. (t) And the same was holden in a case where it appeared that as two little boys were carrying a parcel of cloth to one of the inns at Bath, for the purpose of its being carried by a stage-coach to London, the prisoner came up suddenly, snatched the cloth from the head of one of them, and ran off with it. (u) The same doctrine was also holden in two other cases; in one of which the hat and wig of a gentleman were snatched from his head in the street; (w) and in the other, an umbrella was snatched suddenly out of the hand of a woman, as she was walking along the street. (x) But if any injury be done to the person, or there be any struggle by the party to keep possession of the property before it be taken from him, there will be a sufficient actual "violence." Thus, in the case which has been already mentioned, where an ear-ring was snatched from a lady's ear, and the ear torn through and blood drawn by the force used, it was holden to be robbery. (y) So, where a heavy diamond pin, with a corkscrew stalk, twisted very much in a lady's hair, \*which was close frizzed and strongly craped, was snatched out, and part of the hair torn away at the same time, it was holden that this was a sufficient degree of violence to constitute robbery. (z) And in a case where it appeared that the prisoner snatched at a sword while it was hanging at a gentleman's side, and that the gentleman, perceiving him get hold of the sword, instantly laid tight hold of the scabbard, which occasioned a struggle between them, in which the prisoner got possession of the sword and took it away; the court held that it was a robbery. (a) So that the rule appears to be well established, that no sudden taking or snatching of property from a person unawares is sufficient to constitute robbery, unless some injury be done to the person, or there be some previous struggle for the possession of the property. (b)

[\* 998]

Where violence is made use of, to obtain the property with a felonious intent, as stated in the definition of this offence, it seems that it will not the less amount to robbery, on account Violence accompanied with some

t Macauley's case, O. B. 1783, 1 Leach 287. Baker's case, *id.* 290. S. P.

u Robins's case, *Bridgewater Sum. Ass.* 1787, *cor.* Buller, J., 1 Leach 290, note (a.)

w Steward's case, O. B. 1690, 2 East. P. C. c. 16. s. 121. p. 702.

x Horner's case, O. B. 1790, 2 East. P. C. c. 16. s. 121. p. 703.

y Lapier's case, O. B. 1784, 1 Leach 320, *ante*, p. 990, 991.

z Moore's case, O. B. 1784. 1 Leach 335.

a Davies's case, O. B. 11 Ann. 2 East. P. C. c. 16. s. 127. p. 709. 1 Leach 290, note (a)

b *Ante*, 991.

colourable  
and spe-  
cious pre-  
tence.

of the thief having recourse to some colourable or specious pretence, in order the better to effect his purpose.

[\* 999]

One Merriman, who was taking cheeses along the highway in a cart, was stopped by a person named Hall, who insisted upon seizing them for want of a permit. This was a mere pretence, no permit being necessary. After some altercation, Merriman and Hall agreed to go before a magistrate, to determine the matter: and, during Merriman's absence, other persons riotously assembled on account of the dearness of provisions, and, in confederacy with Hall for the purpose, carried away the goods. It was objected (upon an action against the hundred, on the statutes of hue and cry), that this was no robbery, because there was no force: but Hewitt, J. over-ruled the objection, and left the case to the jury, who were of opinion that Hall's conduct in insisting upon seizing the cheese for want of a permit, was a mere pretence for the purpose of defrauding Merriman, and found that the offence was robbery: which was afterwards confirmed by the court of King's Bench on a motion for a new trial. (c) It is well observed upon this case, that the opinion that it amounted to robbery must have been grounded upon the consideration that the first seizure of the cart and goods by Hall, being by violence and whilst the owner was present, constituted the offence a robbery. (d)

Gascoigne's case. Where a bailiff handcuffed a woman, under pretence of carrying her to prison with greater safety, and by violence extorted money from her when so handcuffed, it was holden to be robbery.

[\* 1000]

In another case also, the offence was holden to be robbery, though the violence made use of was under the colour and pretence of a legal proceeding. The prosecutrix was brought to a police office by the prisoner, into whose custody she had been delivered by a headborough, who had taken her up under a warrant, upon a charge of having committed an assault upon a woman who lodged in her house. The magistrate at the office, having examined the complaint, ordered her to find bail; but at the same time advised the parties to make the matter up, and become good friends. The magistrate then left the office; (e) and the prisoner, who was an under-servant to the turn-key of the New Prison, Clerkenwell, and acted occasionally as a runner to the police office, but had no regular appointment either as a constable or other peace officer, nor had in particular any order to carry the prosecutrix to prison, (f) took her to an adjacent public-house where her husband was waiting, in expectation that she would be discharged. \*When her husband found that the matter was not settled, he requested that the prisoner would wait a short time, while he went to procure bail, and imme-

c Merriman v. The Hundred of Chippenham, cor. Hewitt, J. and afterwards cor. B. R. on the motion for a new trial, Mich. 8 Geo. III. 2 East, P. C. c. 16, s. 127, p. 709.

d 2 East, P. C. c. 16, s. 127, p. 709. note (a).

e In the report of this case in East, it is said, that the prisoner alleged that the magistrate made out a warrant of commitment for the prosecutrix, but that it was not produced.

f See note (c).

diately left the house. As soon as he was gone, the prisoner began to treat the prosecutrix very ill, locked her up for some time in a stinking place, and then brought her out and threatened to carry her immediately to prison. She was terrified, and implored him to wait till her husband returned; and producing a shilling from her pocket, offered to give it him, or even to give him half-a-crown, if he would comply with her request: but he refused, and immediately hand-cuffed her to a man whom he had in custody on a charge of assault, and who, as the prisoner alleged, had before rescued himself. The prisoner then kicked her, thus handcuffed, before him; and shoved her and her companion into a coach, which he ordered to drive to the New Prison. He then came into the coach; and, almost immediately upon the coach setting off, put a handkerchief to the mouth of the prosecutrix, and forcibly took from her the shilling, which she continued to hold in her hand, saying, at the same time, "This will buy us a glass a-piece." He then asked her, if she had any more money in her pocket, said that he was sorry for her children, and that if she had as much money as would pay for the coach she should not go to prison. She exclaimed, that she had no more money: but the man who was handcuffed to her, rattled the handcuff against the side of her pocket; and the prisoner put his hand into her pocket, and took out three shillings. He then continued to promise to carry her back, but did not give any directions to the coachman to change his course. In about ten minutes after he had so taken the three shillings he stopped the coach at a public house, called for some gin, drank some himself, gave the coachman a glass, and offered the prosecutrix a glass, which she several times refused, but at last drank, upon his insisting she should do so: (g) \*he then gave the shilling which he first took from her to pay for the gin, and took six-pence in change. As the prisoner had promised to carry her back, the prosecutrix made no complaint at the public house, but said, that if the prisoner would carry her back he might keep the other three shillings which he had taken from her. The prisoner, however, proceeded with her to the New Prison. He paid a shilling, or one shilling and six-pence for the coach; but returned no part of the money to the prosecutrix. Nares, J. who tried the prisoner, said, that in order to commit the crime of robbery, it was not necessary that the violence used to obtain the property should be by the common and usual modes of putting a pistol to the head, or a dagger to the breast; and that a violence, though used under a colourable and specious pretence of law or of doing justice, was sufficient, if the real intention was to rob: and he left the case to the jury, with a

[\*1001]

g In the report of this case in Leach, it is said, that he induced her to drink a glass by repeating his promise that she should not be detained.

direction that if they thought the prisoner had originally, when he forced the prosecutrix into the coach, a felonious intent of taking her money, and that he made use of the violence of the handcuffs as a means to prevent her making resistance, and that he took the money with a felonious intent, they should find him guilty. The jury found that the prisoner had a felonious intent of getting whatever money the prosecutrix had in her pocket, and that the putting her into the state described in the evidence was only a colourable mean of putting his felonious intention into execution. And upon the case being referred to the twelve Judges, they were unanimously of opinion that, as it was found by the verdict that the prisoner had an original intention to take the money, and had made use of violence, though under the sanction and pretence of law, for the purpose of obtaining it, the offence was clearly a robbery. (*h*)

[\*1002]

Though the violence be not used for the purpose of obtaining the property of the party assaulted; yet if property be obtained by it, the offence may be robbery.

Though the violence be used for a different purpose than \*that of obtaining the property of the party assaulted; yet if property be obtained by it, the offence will, under some circumstances at least, amount to robbery: as where money was offered to a party endeavouring to commit a rape, and taken by him. Blackham assaulted a woman with intent to ravish her, and she without any demand from him offered him money, which he took and put into his pocket, but continued to treat the woman with violence, in order to effect his original purpose, until he was interrupted: and this was holden to be robbery by a considerable majority of the Judges; on the ground that the woman, from the violence and terror occasioned by the prisoner's behaviour, and to redeem her chastity, offered the money, which it was clear she would not have given voluntarily; and that the prisoner, by taking it, derived an advantage to himself from his felonious conduct, though his original intent were to commit a rape. (*i*)

Of the putting in fear.

With respect to the "putting in fear," or constructive violence, when that is the means by which the taking is effected, it may be considered, with reference, first, to those cases in which the fear excited has been of injury to the person; secondly, to those in which the fear excited has been of injury to the property; and, thirdly, to those in which the fear excited has been of injury to the character. It should, however, be remembered, as generally applicable to cases of this description, that where property is extorted by fear, it will constitute a robbery by putting in fear, though it may be taken in the shape of a colourable gift. (*k*) So that if a man whether with or without a drawn sword, or other offensive weapon, but with such circumstances of terror as indi-

*h* Gascoigne's case, O. B. 1783. *cor.* Nares, J. 1 Leach 280. considered of by the Judges in Mich. T. 1783. 2 East. P. C. c. 16. s. 127. p. 709. And see the Sess. par. 295.

*i* Blackham's case, 1787. 2 East P. C. c. 16. s. 128. p. 711.

*k* *Ante*, 991. *et sequ.*



cate a felonious intention, ask alms from a person who gives to him through mistrust and apprehension of violence, it will be robbery: and so it will be if the thief, after having first made an assault, cease to use force, and ask money for alms, \*which is given him by the party attacked, while there remained a reasonable ground for the continuance of the fear excited by the assault. (l) And if thieves come to rob A., and, finding little about him, enforce him, by menace of death, to swear to bring them a greater sum, which he does accordingly, this is robbery, if the fear of that menace continued upon him at the time he delivered the money. (m) [\*1003]

The fear of injury to the *person* is that which is commonly excited on the commission of this offence; and where property is obtained by this means it will amount to robbery, though there be no great degree of terror or affright in the party robbed. It is enough if the fact be attended with such circumstances of terror, such threatening by word or gesture, as, in common experience, are likely to create an apprehension of danger, and induce a man to part with his property for the safety of his person. (n) And it is not necessary that actual fear should be strictly and precisely proved: as the law, in *odium spoliatoris*, will presume fear, where there appears to be a just ground for it. (o)

Of the fear of injury to the person.

One Norden, having been informed that one of the early stage coaches had been frequently robbed near the town by a single highwayman, resolved to use his endeavours to apprehend the robber. For this purpose, he put a little \*money and a pistol into his pocket, and attended the coach in a post chaise, till the highwayman came up to the company in the coach, and to him, and presenting a weapon, demanded their money. Norden gave him the little money he had about him, and then jumped out of the chaise, with the pistol in his hand; and, with the assistance of some others, took the highwayman. This was holden to be a robbery of Norden. (p) Such fear may be presumed, though the party go to meet the robber, and for the purpose of apprehending him. [\*1004]

The fear necessary to constitute the crime of robbery may exist, though the property be taken under colour, and on the pretence of a purchase. For if a person by force or threats compel another to give him goods, and by way of colour oblige him to take, or if he offer less than the value, it is robbery: as where the prisoner took a quantity of wheat worth eight And this fear may exist, though the property be taken under colour and on pre-

l 2 East. P. C. c. 16. s. 128. p. 711. 4 Black. Com. 244. *Ante*, 991. *et sequ.*

m *Ante*, 991. 3 Inst. 68. 1 Hale 532. 2 East. P. C. c. 16. s. 129. p. 714. in which last book the reason given by Hawkins (1 Hawk. P. C. c. 34. s. 1.) for this doctrine, and which would seem to lead to the conclusion, that it would be robbery in such case, though the party delivered the money solely under the mistaken conscientious compulsion of his oath, is denied. And from note (a) in East.

P. C. *ibid.* it seems that the delivery of the money was an act more immediately consequent upon the menace and oath than would appear from the statement of the case as given in the text from 3 Inst. and 1 Hale.

n Fost. 128. 4 Black. Com. 243, 244. Doually's case, 1 Leach 197.

o Fost. 128. 2 East. P. C. c. 16. s. 128. p. 711.

p Fost. 129.



tence of a purchase.

shillings, and forced the owner to take thirteen pence half-penny for it, threatening to kill her if she refused, the offence was clearly holden to be robbery by all the Judges upon a conference. (*q*) But whether the forcing a chapman to sell his wares, and giving him the full value for them, will amount to robbery, has been considered as doubtful. (*r*)

The fear may be of violence to the child of the party.

It seems that the fear of violence to the person of a child of the party from whom property is demanded will fall within the same consideration as if the fear were of violence to the person of the party himself. Thus where a case was put in argument of a man walking with his child, and delivering his money to another person upon a threat that, unless he did so, the other would destroy his child, Hotham, B. said, that he had no doubt that it would be robbery. (*s*) And in a subsequent case Eyre, C. J. said, that a man might be said to take by violence, who deprived the \*other of the power of resistance, by whatever means he did it; and that he saw no sensible distinction between a personal violence to the party himself, and the case put by one of the Judges of a man holding another's child over a river and threatening to throw it in unless he gave him money. (*t*)

[\*1005]

Of the fear of injury to the property.

The cases in which the offence of robbery has been committed by means of a fear of injury to the *property* of the party are principally those in which the terror excited was of the probable outrages of a mob.

Simons's case. Threat to tear the mow of corn, and level the house of the prosecutor.

The prisoner, who was a ringleader in some riots amongst the tinnors in Cornwall, came with about seventy of his companions to the house of the prosecutor, and said, that they would have from him the same as they had from his neighbours, namely, a guinea, or else they would tear his mow of corn, and level his house. He gave them a crown to appease them; when the prisoner swore that he would have five shillings more, which the prosecutor, being terrified, gave him. They then opened a cask of cyder by force, drank part of it, and eat the prosecutor's bread and cheese; and the prisoner carried away a piece. The indictment contained two counts, one for robbing the prosecutor of ten shillings in his dwelling-house by assault and putting him in fear, and the other for putting the prosecutor in fear and taking from him in his dwelling-house a quantity of cyder, pork, and bread. And it was holden robbery in the dwelling-house. (*u*)

Taplin's case. Money extorted by the

During the riots in London, in the year 1780, a boy with a cockade in his hat knocked violently at the prosecutor's door, who thereupon opened it, when the boy said to him, "God

*q* Simons's case, *Cornwall Lent Ass.* 1773. 2 East. P. C. c. 16. s. 123. p. 712.

*r* 1 Hawk. P. C. c. 31. s. 14. 4 Black. Com. 244. *ante*, 993.

*s* Donally's case, 1779. 2 East. P. C. c. 16. s. 130. p. 718.

*t* Reave's case, 1794. 2 East. P. C. c. 16. s. 132. p. 735.

*u* Simons's case, 1773. 2 East. P. C. c. 16. s. 131. p. 731. See another case against the same prisoner where the threat was of injury to the person, *ante*, 1004.

“bless your honour, remember the poor mob.” The prosecutor told him to go along; on which he said, “Then I \*will go and fetch my captain,” and went away: but soon afterwards the mob, to the number of a hundred, armed with sticks and such other things as they had been able to procure, came, headed by the prisoner, who was on horseback, and whose horse was led by the same boy. On their coming up the bystanders said, “You must give them money;” and the boy said, “Now I have brought my captain:” and some of the mob said, “God bless this gentleman, he is always generous.” The prosecutor then said, to the prisoner, “How much?” to which the prisoner answered, “Half-a-crown Sir;” upon which the prosecutor, who had before only intended to give a shilling, gave the prisoner half-a-crown. The mob then gave three cheers, and went to the next house. This was holden to be robbery. (x)

prisoner at [\*1006] the head of a mob without any particular threat being expressed.

In another case, which occurred also upon the trial of some of the rioters in the year 1780, the prosecutor swore that the prisoner and another man entered into his dwelling-house; and, upon being asked by him what they wanted, the prisoner, having a drawn sword in his hand, said with an oath, “Put one shilling into my hat, or I have a party that can destroy your house presently;” upon which he gave him a shilling. It was also sworn, by another witness, that the prisoner also said, that if the prosecutor “would keep the blood within his mouth he must give the shilling.” This offence was also holden to be robbery. (y)

Brown's case. Money extorted by a threat of destroying the house.

In a subsequent case, corn was taken from the prosecutor by the prisoner and a mob who accompanied him compelling the prosecutor to sell it under its value, by a threat that if he would not sell it at the sum offered it should be taken away. The prosecutor had corn belonging to other persons in his possession, when the prisoner came to him, together with a great mob marching in military order. One of the mob said that if he would not sell they were going to take it away; and the prisoner said that they would give thirty shillings a load, and if he would not take that, they would take the corn away; upon which the prosecutor sold corn for thirty shillings, which was worth thirty-eight shillings. This was ruled to be robbery. (z)

Spencer's case. Threat of taking corn away, by which the prosecutor was compelled to sell it for less than [\*1007] its value.

Some years subsequent to the cases which have been mentioned, and during the riots at Birmingham, a case occurred, where money was obtained from the owner by a threat that if he did not give it, his house should be destroyed by a mob. The two prisoners were indicted for

Astley's case. Money obtained by a threat, that the

x Taplin's case, O. B. 1780. 2 East. P. C. c. 16. s. 128. p. 712.

y Brown's case, O. B. 1780. 2 East. P. C. c. 16. s. 131. p. 731.

z Spencer's case, *con.* Buller, J. York Sum.

Ass. 1783. 2 East. P. C. c. 16. s. 128. p. 712. 713. The prisoner was executed. As to cases where the owner has been compelled to part with his property under colour of a purchase, see *ante*, 993, 1004.

house of  
the prose-  
cutor  
should be  
pulled  
down by a  
mob at a  
future time.

[\*1008]

robbing one Jonathan Grundy. The evidence in substance was that the prisoners, together with a man who was unknown, went to the house of Mr. Grundy near Birmingham; when, upon Mr. Grundy coming out, they pulled off their hats, and shouted, "Church and King; upon which Mr. Grundy did the same, and advanced towards the prisoners in much alarm, when the stranger accosted him, and said, "I am come out of friendship to you, Mr. Grundy, to let you know your house is marked to come down to-morrow inorning at two o'clock.—I am the head of the mob; they are two thousand strong in Birmingham—I must have something to make my men drink; I can bring two or three hundred in an hour's time, or keep them back." Mr. Grundy said, "As to something to drink, you shall have any thing you have a mind for." The stranger then said, "I must have money." Mr. Grundy offered him half-a-crown, which he rejected with contempt; upon which Mr. Grundy asked what he wanted, and he replied that he must have twenty guineas; and, upon Mr. Grundy telling him that he had not so much in the house, said, that if Mr. Grundy did not give him something handsome for his men to drink, his house should come \*down. Mr. Grundy said, that he might have nine or ten guineas; which he asked to see. While Mr. Grundy was taking his purse out of his pocket, one of the prisoners told him he might depend upon it that the stranger was the head of the mob; with other discourse of a similar kind as to his power, and particularly that he was the first man who had entered every house that had been destroyed. This expression so struck Mr. Grundy that he immediately took the money, which amounted to nine guineas and a half, out of his purse, and gave it to the stranger; who counted it, and demanded something to drink; when they all went into Mr. Grundy's house, and had some liquor; after which, in going away, they assured Mr. Grundy that he should be protected. There was no evidence that the prisoners had any of the money at the time; but it appeared that a small share of it was given to them afterwards. Mr. Grundy, in giving his evidence, said, that he was greatly alarmed, but not for his person; that no injury was threatened to his person; but that, when he delivered his money, his apprehension was that, if he had refused to do so, the men would have gone to Birmingham, and have returned with other persons, and pulled down his house and plundered it, (before he could have removed his wife, who was in the house in great agitation,) as they had threatened, and as different houses in Birmingham had been before pulled down.

Upon these facts it was objected, on behalf of the prisoners, that there was no evidence of robbery, as the prosecutor did not deliver his money from any immediate fear of danger to himself or his property, but from an apprehension

of future injury to his house by pulling it down. The truth of the evidence was, however, left to the jury; who found the prisoners guilty, saying, that they were satisfied that Mr. Grundy did not deliver his money from any apprehension of danger to his life or person, but from an apprehension that, if he refused, his house would at some future time be pulled down, as the prisoners and the stranger threatened, \*in the same manner as other houses in Birmingham had [\*1009] been before. And the facts of the case being afterwards submitted to the judges for their opinion whether the evidence amounted to robbery, a majority of them held that it did. (a)

The cases of robbery in which the property has been obtained, by means of a fear being excited of injury to *the character* of the party robbed, appear to be all of one description. Indeed it has been said, that the terror which leads a party to apprehend an injury to his character, has never been deemed sufficient to support an indictment for robbery except in the particular instance of its being excited by means of insinuations against, or threats to destroy the character of the party pillaged, by accusing him of sodomitical practices. In the case, in which this doctrine is laid down, it appeared that the prisoners, assisted by other persons, got the prosecutrix into a house, under pretence of an auction being carried on there, forced her to bid for a lot of articles which was immediately knocked down to her, and then, upon her not producing the money to pay for it, threatened that she should be taken to Bow-street, and from thence to Newgate, and be imprisoned till she could raise the money; that, after these threats had been used, a pretended constable was introduced, who said to the prosecutrix, "Unless you give me a shilling, you must go with me." upon which she was induced to give the pretended constable a shilling; and that the prosecutrix parted with the shilling, being in bodily fear of going to prison, as a means of obtaining her liberty, and to avoid being carried to Bow-street and to Newgate, and not out of fear or apprehension of any other personal force or violence. The judges, after argument, and a minute discussion of the circumstances of the case, were of opinion that they were not sufficient to constitute the crime of robbery. They thought that the threat used of taking the prosecutrix to Bow-street, \*and from thence to Newgate, was only a threat to put her into the hands of the law, which she might have known would have taken her under its protection and set her free, as she had done no wrong; that an innocent person need not in such a situation be apprehensive of danger; and, therefore, that the terror arising from such a source was not sufficient to induce an in-

Of the fear of injury to the character.

The fear of being sent to prison is not alone a sufficient ground of terror to constitute robbery.

[\*101]

a Astle's case. (James and Ezekiel), 2 East, P. C. c. 16, s. 131, p. 729

dividual to part with property, so as to amount to a robbery. And they said, it was a case of simple duress for which the party injured might have a civil remedy by action, which could not be, if the fact amounted to felony. (*b*)

But the fear of injury to character, which may be excited by accusing a person of sodomitical practices, has been holden to come under a different consideration. The imputation of being addicted to so odious and detestable a crime, would be sufficient to deprive the injured person of all the comforts and advantages of society, and would inflict a punishment more terrible than death, both in apprehension and reality. The law, therefore, considers the fear of losing character by such an imputation, as equal to the fear of sustaining personal injury, or even of losing life itself. (*c*)

Jones's case. Case of robbery where the prosecutor stated, that at the time he parted with his money [\*1011] he understood the threatened charge to be an imputation of sodomy; that he was so alarmed by the idea, that he had neither courage nor strength to call out for assistance; and that the violence with which he had been detained in the street, the prisoner, put him in fear for the safety of his person.

The prisoner was indicted for a highway robbery, and the following facts appeared upon the evidence. The prosecutor and the prisoner, not being at the time at all acquainted, pressed, together with a great crowd, into the upper gallery of the play-house at Covent-garden, after which the prisoner took his seat by the side of the prosecutor. During the play the prisoner asked the prosecutor whether a journeyman who had spoken to him was of his \*company; to which the prosecutor replied in the negative; and no other conversation passed between them during the play. When the play was over the prisoner followed the prosecutor out of the house, and as they were crossing Bow-street proposed to him to have something to drink, to which the prosecutor assented, and they went together to an adjoining public-house. In a few minutes, and after they had drunk some porter, the prisoner turned towards the prosecutor, and asked him what he meant by the liberty he had taken with his person in the play-house. The prosecutor said, that he knew of no liberties being taken; when the prisoner replied, "Damn you, Sir, but you did; and there were several reputable merchants in the house who will take their oaths of it." The prosecutor, much alarmed, immediately rose from his seat, paid for the porter, and went out of the house, saying to the prisoner, that he did not know what he meant. The prisoner followed him into the street, where there was a considerable crowd, and halloed out, "Damn you, Sir, stop! for if you offer to run, I will raise a mob about you;" and then seizing him violently by the arm, exclaimed, "Damn you, Sir! this is not to be borne! you have offered an indignity to me, and nothing can satisfy it!" The prosecutor, terrified by these expressions, and the man-

*Knewland and Wood* (case of), O. B. 1796 2 Leach 721. 2 East. P. C. c. 16. s. 131. 732. It appears from the latter book, that the case was considered by the Judges in Hil. T 1796, Ashhurst, J., Hotham, B., Per-ryn, B. and Buller, J. being absent. But the

opinion of the Judges was afterwards delivered by Ashhurst, J., who did not state that he in any way dissented.

*c* By Ashhurst J. in the case of *Knewland and Wood*, 2 Leach 731.

ner in which they were uttered, replied, "For God's sake what do you want, what would you have me do?" to which the prisoner said, in a lower tone of voice, "A present—a present—you must make me a present." The prosecutor asked him, "A present, of what?" upon which the prisoner said, "Come, come, what money have you? How much can you give me now?" The prosecutor said, he had but little money, but that the prisoner should have what he had about him; and accordingly gave him three guineas, and some silver. The prisoner said, it was not enough, and demanded more. During the whole of this conversation the prisoner held the prosecutor fast by the arm, and thereby defeated several efforts which he made to get away; and at length, when he suffered the prosecutor to walk on, still accompanied him, keeping tight hold of his \*arm, down another street. At length [\*1012] the prisoner loosed his arm, but did not leave him; and as he refused to tell his name, or where he lived, followed him to the door of his lodging. Early the next morning the prisoner called at the lodgings, and frightened the prosecutor out of a further sum of forty pounds. The prosecutor soon afterwards communicated what had happened to a friend, and by his advice determined to apprehend the prisoner when he could meet with him; but he was not apprehended till some months after, when he again called upon the prosecutor, and again threatened to impeach his character, unless he would give him more money.

In this case the prosecutor swore, that at the time he parted with his money he understood the threatened charge to be the imputation of sodomy; that he was so alarmed by the idea, that he had neither courage nor strength to call out for assistance: and that the violence with which the prisoner had detained him in the street, had put him in fear for the safety of his person. The case was left to the jury, with a direction to consider whether the prosecutor parted with his money under the impression of fear: and the jury found the prisoner guilty; declaring, that they thought that such an accusation would strike a man with as much or more terror than if he had a pistol at his head. Judgment being respited in order that the opinion of the Judges might be taken, the point was afterwards considered by them; and they were of opinion, that the conviction for a highway robbery was proper; that, in order to constitute robbery, there was no occasion to use weapons, or real violence: and that taking money from a man in such a situation as rendered him not a free man (as if a person so robbed were in fear of a conspiracy against his life or character) was such a putting in fear as would make the taking of his money under that terror a robbery. (*d*) And a case which had been pre-

*d* Jones's *alias* Evans's case, 1776, 1 Leach 139. 2 East, P. C. c. 16, s. 130, p. 714. Nine

of the Judges only were present at the consideration of the case. De Grev, C. J. and Ash-



viously \*decided upon the same point, was mentioned with approbation. (e)

In the latter case, which was so mentioned with approbation by the Judges, it appears that there was some actual violence used in the assault, and a laying of hands on the party; and in the former case there was, as has been seen, a continual force and violence, and a threat to deliver the party up to the mob as a sodomite. besides the fact of laying hold of the arm; circumstances which have been urged as giving a peculiar character to those cases, and as making them distinguishable from one in which no such circumstances should exist. (f) But the circumstances of actual violence appear to have been holden not to make any material distinction in a case in which they did not occur, and where the Judges, after great discussion, held the offence to amount to robbery.

Donally's case. Obtaining money by saying, "You had better comply, or I will take you before a magistrate and accuse you of an attempt to commit an unnatural crime," holden to be robbery.

On the 18th of January, 1779, the prosecutor, a young gentleman, was passing through Soho-square, between the hours of six and seven o'clock in the evening, when he met the prisoner, whom he had never seen before. The prisoner accosted him, and desired that he would give him a present. The prosecutor said, "For what?" The prisoner answered, "You had better comply, or I will take you before a magistrate, and accuse you of an attempt to commit an unnatural crime." The prosecutor then gave him half a guinea, which the prisoner said was not sufficient; but the prosecutor had no more in his pocket. On the 20th of January, \*about four o'clock in the evening, the prosecutor met the prisoner again in Oxford-street, who made use of the same threats as before; telling the prosecutor that he knew what had passed in Soho-square, and that unless he would give him more money, he would take him before a magistrate and accuse him of the same attempt; adding, that it would go hard against him, unless he could prove an *alibi*. The prosecutor then went to the shop of a grocer in Old Bond-street, the prisoner following him, and staying on the outside the door; and the prosecutor, being in the shop, took a guinea out of his pocket, gave it to the grocer, and desired he would give it to the man at the door; which the grocer did, and the prisoner then went away. The prosecutor stated, that he was exceedingly alarmed at both the times, and under that alarm gave the money; that he was not aware what were the consequences of such a charge, but apprehended that it might cost him his life.

hurst, J. being absent, and there being one vacancy.

e Brown's case, O. B. 1763, cor. Eyre, B. when Recorder, 2 East. P. C. c. 16. s. 130. p. 715. where Harrold's case, *alias* Hutton's, O. B. 1778, is mentioned, as one in which

the prisoner was convicted for a similar robbery.

f See the judgments of Perryn, B. and Blackstone, J. in Donally's case, 2 East. P. C. c. 16. s. 130. p. 717, 718, 721. and the judgment of the court, as delivered by Willes, J. in Donally's case. 1 Leach 199.

The case was left to the jury, with directions to consider, first, whether they were satisfied that the prosecutor delivered his money through fear, and under an apprehension that his life was in danger; and, secondly, if they should not think that the prosecutor apprehended that his life was in danger, then, whether the money was not obtained by means of the prisoner's threats, and against the will of the prosecutor; for if it were, even in that case, though he were not in fear of his life, the crime would amount to robbery. The jury found the prisoner guilty; and said that they were satisfied that the prosecutor delivered his money through fear, and under an apprehension that his life was in danger. But, doubts being entertained respecting the conviction, the judgment was respited, and the question submitted to the opinion of the Judges. Some difference of opinion prevailing amongst them, they directed the case to be argued; and after argument, and very full consideration, they at length all agreed that it amounted to robbery.

The opinions of the Judges were delivered *seriatim*, and \*contain some learned and interesting discussions relating to the nature of the fear by which a party may be induced to part with his property, in cases where no actual violence is employed to obtain it: (g) and Willes, J. afterwards delivered the result of their deliberations. He said, that the facts of the case shewed that there was the necessary felonious intention in the prisoner to rob the prosecutor; and that it was impossible to raise a doubt, that there was a sufficient taking from the prosecutor's person. With respect to the putting in fear, he stated, that it is not necessary to lay a putting in fear in the indictment; and that the circumstance of actual fear need not be proved upon the trial; for if the fact be laid to be done violently and against the will, the law in *odium spoliatoris* will presume fear. That there need not be actual violence, a reasonable fear of danger caused by constructive violence being sufficient; and that where such terror is impressed upon the mind as does not leave the party a free agent, and he delivers his money in order to get rid of that terror, he may clearly be said to part with it against his will, so as to constitute robbery. That no actual danger is necessary; as a man may commit a robbery without using any offensive weapon; as by using a tinder-box or a candlestick instead of a pistol. And that when a villain comes and demands money, no one knows how far he will proceed. The learned Judge then referred to the facts and circumstances of the case, as sufficient to bring it within these rules of law. He stated, that the situation of the prosecutor was that of a

[\*1015]

g These opinions are given at length in the report of the case in 2 East. P. C. c. 16. s. 130. p. 716. to p. 726.

young gentleman accosted at night, in the streets of London, by a person he never saw before, and whom he must have suspected to be a villain; and that this person *demanded* a present. Even that seemed sufficient to satisfy the legal idea of robbery. But the prisoner went further, and used the words, "You had better comply, or I will take you before a magistrate." This then was a threat of personal [\*1016] \*violence; for the prosecutor had every thing to fear in being dragged through the streets as a culprit charged with an unnatural crime. It was a threat which must necessarily and unavoidably produce intimidation, and occasion a reasonable fear, which might operate *in constantem virum*, as well as *in meticulosum virum*. He then observed, upon the argument urged by the counsel for the prisoner, that this was a fraudulent taking, and not a taking by violence; and said, that in many cases fraud would supply the place of violence; as in burglary; where though it was necessary to charge a breaking in the indictment, yet there might be a constructive breaking by a person fraudulently getting admission into a house by colour of law, or under pretence of taking lodgings, or of having business. (*h*) But he said, that the Judges did not determine the case entirely on this ground, but were of opinion that there was proof of a constructive violence, which they thought was sufficient: and that they were all of opinion, that enough was proved in this case for the jury to find the prisoner guilty of robbery (*i*)

This doctrine appears to have been acted upon in subsequent cases; (*k*) in one of which the party delivered his money solely for fear of losing his character.

Hickman's case. Obtaining money by threatening to take  
[\*1017] another before a justice, on a charge of an unnatural offence, holden to be robbery though the prosecutor

Daniel Hickman was indicted for robbing one John Miller of two guineas. It appeared upon the evidence, that the prosecutor had some employment in the palace at St. James's, and an apartment there in which he was accustomed to sleep, and that the prisoner was occasionally a [\*1017] \*sentinel on guard at the palace. One night the prosecutor treated the prisoner with some bread and cheese and ale, in his room. About a fortnight afterwards, very late in the evening, the prosecutor was going up stairs to his apartment, when he heard somebody close behind him, and, on turning round, saw that it was the prisoner, who said. "It is me." The prosecutor asked him, what brought him there at that time of night: upon which the prisoner answered, "I am come for satisfaction; you know what passed the

*h* Ante, 908.

*i* Donally's case, 1779. 1 Leach 193. 2 East. P. C. c. 16. s. 130. p. 715. to 728.

*k* Staple's case, O. B. 1779, Hickman's case, O. B. 1783, considered of by the Judges in 1783, 2. East. P. C. c. 16. s. 130. p. 723.

Staple was executed, but Hickman was reprieved on condition of Transportation. It appears from Hickman's case (1 Leach 279.), that Donally was not executed, and that some doubts had been entertained as to the opinion of the twelve Judges in that case.

other night ; you are a sodomite ; and if you do not give me satisfaction, I will go and fetch a sergeant and a file of men, and take you before a justice ; for I have been in the Black Hole ever since I was here last, and I do not value my life." The prosecutor then asked him what money he must have ; when the prisoner said, " I must have three or four guineas." The prosecutor gave him two guineas, which was all he had, and promised to give him another guinea the next morning : and the prisoner took the two guineas, saying, " Mind, I don't *demand* any thing of you." The next morning he came and received the other guinea ; and, in a few days after, upon making an application for more money upon the same pretence, he was apprehended. The prosecutor swore, that he was very much alarmed when he gave the prisoner the two guineas, and did not very well know what he did ; but that he parted with his money under an idea of preserving his character from reproach, and not from the fear of personal violence.

stated, that he parted with his money under an idea of preserving his character, and not from fear of personal violence.

The learned judge, who tried the prisoner, in leaving the case to the jury, remarked, upon the point in which it might be supposed to differ from that of Donally, (*l*) that in Donally's case the prosecutor had sworn that he delivered his money under an apprehension of personal danger, as well as from the fear of losing his character : but that in the present case the prosecutor had sworn that he parted with his money for the sake of his character only, and not \*from any apprehension of danger to his person. The jury [\*1018] found the prisoner guilty ; and that the prosecutor parted with his money, against his will, through a fear that his character might receive an injury from the prisoner's accusation : but as some doubt was entertained whether the case was within the principle upon which Donally's proceeded, it was submitted to the consideration of the Judges ; and their opinion was, afterwards, delivered by Ashhurst, J. to the following effect : " Some doubts having been entertained as to the opinion of the twelve Judges, in the case of Patrick Donally, the learned Judge, who tried the prisoner, thought it proper that the present case should, likewise, be referred to their consideration. They have, accordingly, conferred upon it ; and they are of opinion that it does not *materially* differ from the case of Donally : for that the true definition of robbery is the stealing, or taking from the person, or in the presence of another, property of any amount, with such a degree of force or terror as to induce the party unwillingly to part with his property ; and whether the terror arises from real or expected violence to the person, or from a sense of injury to the character, the law makes no kind of difference ; for to most men the idea of losing their fame and re-

putation is equally if not more terrific than the dread of personal injury. The principal ingredient in robbery is a man's being *forced* to part with his property: and the judges are unanimously of opinion that upon the principles of law, and the authority of former decisions, a threat to accuse a man of having committed the greatest of all crimes is, as in the present case, a *sufficient force* to constitute the crime of robbery, by putting in fear." (m)

[\*1019]

This case seems to have gone to the full extent of the doctrine upon which it proceeded, and must be considered as in some measure qualified and restrained by subsequent decisions; \*in one of which it was holden that as the prosecutor had parted with his property for the purpose of convicting the prisoners, and after the apprehension of injury to his character, from the foul charge, had ceased, it was not robbery; (n) and in the other, it was holden by a majority of the Judges that in order to constitute robbery, in a case of this kind, the property must be taken upon an immediate apprehension of present danger, upon the charge being made, and not after the parties have separated, and there has been time to deliberate and procure assistance, and after a friend has actually been consulted respecting the transaction. (o)

Reane's case. The prosecutor having parted with his property for the purpose of convicting the prisoners, and after the apprehension of injury to his character had ceased, it was holden not to be robbery.

The prisoner, James Reane, was indicted for a highway robbery, and taking nineteen guineas and a shilling; and David Watkins was charged, in the same indictment, as an accessory before the fact. The evidence of the prosecutor disclosed the following circumstances: On the 12th of May, 1794, the prosecutor met the prisoner, Reane, in the street. He was an entire stranger to the prosecutor: but he asked for money, saying that he was in great distress; and, upon the prosecutor's refusing to give him any, went away muttering expressions of anger and discontent. On the next day he again met the prosecutor in the street, and repeated his request for money; and, on being refused, said "You shall be the worse for it." On Friday, the 23d of May, he again accosted the prosecutor in the street, and told him that he had taken indecent liberties with him in the park, and that it had been seen and could be proved by a third person. The prosecutor, with a violent exclamation, asked him what he meant; to which he made no reply, but walked away. On the next day the prosecutor received a letter from him containing similar charges, and mentioning his place of residence: in consequence of which the prosecutor, having consulted with a friend, was induced to write to him,

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\*and appoint to meet him in the street to hear what he had

m Hickman's case, 1 Leach 278. 2 East. P. C. c. 16. s. 130. p. 723. The prisoner was not executed: see *ante*, note (k).

n Reane's case, 1794. 2 Leach 616. 2 East. P. C. c. 16. s. 132. p. 734.

o Jackson and Shipley (case of) 1 East. P. C. Addenda xxi.

to say. He accordingly met him there, when Reane said that if the prosecutor did not give him money he could prove his having committed indecencies with him in the park, as a third person had seen it; upon which the other prisoner, Watkins, joined them, saying, "Yes, I saw you." The prosecutor exclaimed, that it was a horrid abominable falsity: upon which Watkins said, "You have great interest with government; I shall be glad of a place as a clerk, either in the custom or excise." The prosecutor said that he would apply for one, upon which Watkins went away. Reane then said, "You have given that man a certainty: I will have a certainty also;" upon which the prosecutor told him that he should. On the following morning Reane met the prosecutor by appointment, and told him that he had considered the matter, that he must have twenty pounds in cash, and a bond for fifty pounds a year; upon which the prosecutor, in pursuance of a plan which he had previously concerted with his friend, told him that he could not give them to him then, but that if he would wait a few days he would bring him the money and the bond. The prosecutor, on his next interview with Reane, offered him the twenty pounds; but he refused to take the money without the bond, upon which the prosecutor fetched the bond, and gave it, together with nineteen guineas and a shilling, to Reane, who carried both the bond and the money away with him, saying that he would not give the prosecutor any further trouble. It was objected on behalf of the prisoners that this proof was defective; as in order to constitute robbery there must be a violence, or fear of danger, to the person or character; and that such violence, or fear, must exist at the time when the property is parted with: but the case was left to the jury, who found the prisoner guilty; upon which judgment was respited, in order that the opinion of the twelve Judges might be taken. At the first conference the Judges (Buller, J. being absent) were inclined to think that this was not robbery, as there was neither violence nor fear at the time the prosecutor parted with his property. Kyre, C. J. observed, "that it would be going a step further than any of the cases to hold this to be robbery. That the principle of robbery was violence: and where the money was delivered through fear, that was constructive violence. That the principle he had acted upon, in such cases, was to leave the question to the jury, whether the defendant had, by certain circumstances, impressed such a terror on the prosecutor as to render him incapable of resisting the demand. Therefore, when the prosecutor swore that he was under no apprehension at the time, but gave his money only to convict the prisoners, he negatived the robbery. That this was dif-

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ferent from Norden's case, (*p*) where there was actual violence: for here there was neither actual nor constructive violence. A man might be said to take by violence who deprived the other of the power of resistance, by whatever means he did it. And he saw no sensible distinction between a personal violence to the party himself, and the case put by one of the Judges of a man holding another's child over a river, and threatening to throw it in unless he gave him money." The Judges thought the matter deserving of further consideration; but they ultimately adhered to the opinion to which they had at first inclined; and held (Buller, J. being absent) that the conviction was wrong; as there was no violence either actual or constructive. (*q*)

Jackson, Shipley, and Morris, (case of.) Taking money from the prosecutor, upon a threat to accuse him of an unnatural offence, is not robbery, unless the money were taken immediately upon the threat made, and not after the parties had separated, and there had been time for the prosecutor to deliberate and procure assistance: and more especially not, where the prosecutor consulted a friend, and such friend was present when the money was paid.

The prisoners John Jackson, William Shipley, and John Morris, were indicted for robbing one W. S. in the dwelling-house of one S. Rowe. The evidence of the prosecutor was, that while he was threshing in his father's barn, at a place called Gidling, the prisoners Shipley and Morris came to him and asked if W. S. lived there, to which he answered that he was the man. They then asked him, if he remembered lying with two soldiers some time before; and upon his saying that he did, they said that one of the soldiers named Jackson, had said that he had *abused* him; and \*that Jackson was then come over to Carlton, (an adjoining place) and would certainly follow the law, unless he would come and make it up with him: but, that if he went there and made it up with Jackson, there would be no more of it. The prosecutor answered, that he knew nothing of the sort, but that he would go and hear what Jackson had to say. Shipley and Morris then went away; and the prosecutor followed them to a public-house, kept by S. Rowe, at Carlton, where he also found the prisoner Jackson, and another soldier. Some conversation took place in a private room, when Jackson preferred the same charge against the prosecutor of his having unreasonably abused him; which was positively denied by the prosecutor. At last Jackson told the prosecutor, that if he would pay him the expences, there should be no more of it; and, upon the prosecutor saying that he was willing to pay any thing in reason, Morris and Shipley made out a sort of account, by setting down in writing the following articles as mentioned by Jackson, "Doctor, 1*l.* 11*s.* 6*d.*—For abusing me, 1*l.* 8*s.*—Morris, 10*s.*—Shipley, 5*s.*—The other soldier, 2*s.* 6*d.*" The total was 3*l.* 17*s.*—but they asked to have four guineas. The prosecutor said, he had no such money: but, upon their insisting upon having it, he said, he would try to get it from his parents; and asked one of them to accompany him, which Shipley accordingly did. The prosecutor swore

*p* *Ante*, 1003.

*q* Reane's case. 2 East. P. C. c. 16. s. 132. n. 734. 2 Leach 616.

that he was much frightened and hurried, and did not know what best to do. He went however, accompanied by Shipley, to his mother's; and, under the pretence of a soldier having been hurt, obtained from her four guineas. On their return to the public-house, the prosecutor stopped at the house of one Shelton, and prevailed upon Shelton to go along with him. Shelton enquired what was the matter; and, upon being informed by Shipley, declared his disbelief of the charge, and said that if it were his own case, he would not pay the money; upon which Shipley said, that if the prosecutor did not pay the money, it would cost him 50*l.* or 100*l.*, or perhaps his neck; that he was himself a constable, and would go for a warrant the next morning. This language \*frightened the prosecutor very much. When the prosecutor, Shipley, and Shelton got to the public-house, Jackson, Morris, and the other soldier, were in the same room in which the prosecutor had left them. The prosecutor sat down: and, after a few minutes, laid the four guineas upon the table, and asked who would take it; upon which they all said "Jackson:" but Shipley took it up; and amongst them they returned back six shillings to the prosecutor, half-a-crown of which was said to be for his friend's expences, (meaning Shelton.) The prosecutor asked for a receipt; but Morris said his friend would do as well: and Shelton made some enquiries as to the doctor to whom Jackson had applied, but received only evasive answers. The prosecutor swore to the falsehood of the charge, but said he was scared at it, and that was the reason why he parted with his money. On his cross-examination it appeared, that Jackson had first made the charge on the morning after the night they had lain together, but did not repeat it then; and that they continued eating and drinking for several hours after: that afterwards, he had heard of Jackson's having repeated the charge in several companies, which had caused him much agitation. Shelton's evidence went to confirm the prosecutor in his account as to the part of the transaction which happened in his presence; and he also swore that as they were going into the public-house, he called the prosecutor back, and advised him not to pay the money. And he added, that the prosecutor was quite scared out of his wits.

[\*1023]

These facts being left to the jury, they found the prisoners guilty, and sentence was passed upon them; but execution was respite*d* on a doubt conceived by Graham, B., by whom they were tried, whether the case did not go somewhat beyond those which had been previously decided; and principally, because the prosecutor had a friend present during the transaction. The case being submitted to the consideration of the Judges, a majority of them were of opinion that it did not amount to robbery, though the money were \*taken in the presence of the prosecutor, and the fear of losing his charac-

[\*1024]

ter were upon him. Most of the majority thought that, in order to constitute robbery, the money must be parted with *from an immediate apprehension of present danger upon the charge being made*; and not, as in this case, where the parties had separated, and the prosecutor had time to deliberate upon it, and apply for assistance; and had applied to a friend, by whom he was advised not to pay it, and who was actually present at the very time when it was paid; which circumstances they thought had the appearance rather of a composition of a prosecution than of a robbery, and seemed like a calculation whether it were better to lose his money, or risk his character. And one of the Judges, who agreed that it was not robbery, thought that there was not such a *continuing fear* as could operate in *constantem virum*, from the time when the money was demanded, until it was paid; as in the interval the prosecutor had taken advice, and might have procured assistance. Those Judges, who thought the case did amount to robbery, considered the question as concluded by the finding of the jury, that the prosecutor had parted with his money through fear continuing at the time, which fell within the definition of robbery which had been long adopted and acted upon; and they said that it would be difficult to draw any other line. They thought also that this sort of fear so far differed from cases of mere bodily fear, that it was not likely to be dispelled, as in those cases, by having the opportunity of applying to magistrates or others for assistance; the money being given to prevent the public disclosure of the charge. (r)

[\*1025] Mr. East, who cites this case, from MS. Jud. (s) has suggested a question whether the decision does not in a great measure over-rule the case of Hickman, which is mentioned \*in the preceding pages. (t) . But it should be observed, that the circumstances of these cases materially differ; and particularly that in Hickman's case the two guineas were given *immediately* upon the charge being made, and that there was no previous application to any friend or other person, from whom advice or assistance might have been procured.

Having thus treated of the facts and circumstances necessary to constitute the crime of robbery, this chapter may be concluded by shortly adverting to some points which have been decided respecting persons aiding and abetting in this offence, and also respecting the indictment.

Of principals and accessories.

The same general rules which prevail in other cases of principals and accessories, apply also in the case of robbery. (u) Thus if several persons come to rob a man, and

r Jackson, Shipley, and Morris (case of) cor. Graham, B. Nottingham Spr. Ass. 1802, and East. T. 1802. 1 East. P. C. *Addenda* xxi.

s *Id.* xxiv. in the margin.

t *Ante*, 1016, *et sequ.*

u *Ante*, Book I. Chap. 2.

they are all present, and one only actually takes the money, it is robbery in all. (x) So if A., B., and C., come to commit a robbery, and A. stand sentinel at a hedge-corner to watch if any person should come, and B. and C. commit the robbery, it will be robbery in A. also, though he was at a distance from them, and not within view. (y) And the principle of several persons engaged in one common design, being in the eye of the law present when the fact is committed, has been carried to a considerable extent in the case of robbery. For where three men went out to rob, and attacked a man who made his escape, and while two of them were engaged with that man, the third robber rode off and robbed another person in the same highway, without the knowledge of the two other robbers, and out of their view, and then returned to them; it appears to have been holden that all of them were guilty of this robbery, as they came together with an intent to rob, and to assist one another in \*so doing. (z) But where several men by agreement rode out to commit robbery, and at Hounslow one of them parted from the company, and rode away towards Colbrook, and the others rode towards Egham, and at the distance of about three miles from Hounslow, committed a robbery: it was holden that the man who parted from the company was not guilty of this robbery, though he rode out with the others upon the same design: for he left them at Hounslow, and, as he did not fall in with them afterwards, possibly he repented of the design, but at least he did not pursue it. a

[\*1026]

The presumption of a party repenting of his evil design, appears to have been admitted to a greater extent in a more modern case. It appeared in evidence that the two prisoners accosted the prosecutor as he was walking along the street, by asking him, in a peremptory manner, what money he had in his pocket. Upon his replying that he had only twopence halfpenny, one of the prisoners immediately said to the other, "If he really has no more, do not take that," and turned, as if with an intention to go away: but the other prisoner stopped the prosecutor, and robbed him of the twopence halfpenny, which was all the money he had about him. But the prosecutor could not ascertain which of them it was that had used this expression, nor which of them had taken the halfpenny from his pocket. The court said that this evidence went to the acquittal of both the prisoners; for if two men assault another, with intent to rob him, and one of them, before any demand of money, or offer to take it be made, repent of what he is doing, and desist from the prosecution of such intent, he cannot be involved in the guilt of his companion, who afterwards takes the money; for he

c 1 H. 6, 534. 1 Hawk. P. C. c. 34, s. 5.

1 Hale 533, 534.

c 1 H. 6, 534, 537, ante, 30.

a Hyde and others (case of) 1 Hale 537

c 1 Hawk. P. C. c. 34, s. 5. Foster's case,

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191, 11.

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changed his evil intention before the act which completes the offence was committed. That the prisoner, therefore, whichever of the two it was who thus desisted, could not be guilty of the offence charged: that one of them was guilty, \*but which of them personally did not appear. And as the prosecutor could not ascertain who it was that took the property, both the prisoners must be acquitted. (b)

Of the indictment.

The indictment for robbery must state an assault upon the person; and that such assault was made *feloniously*. And where the indictment charged that the prisoner, "in and upon one I. M., &c. did make an assault, and him the said I. M., in corporal fear and danger of his life then and there *feloniously did put*," it was holden to be defective; and that the omission of the statement of the assault having been feloniously made was not aided by the statement of the prosecutor having been feloniously put in fear and danger of his life. (c) The taking must be charged to be with violence, and against the will of the party; and the statement, in the usual form of an indictment for this offence, is, certain goods, &c. of the said A. B., from his person and against his will, then and there feloniously and violently did steal, take, &c." But the word *violently* is not essentially necessary: as in a case where it was objected that the indictment did not show that the taking was done *violenter*, and that the prisoner was, therefore, entitled to his clergy, and the authority of Lord Hale was cited, (d) all the Judges, upon the point being reserved, agreed that the word *violenter* \*was no technical term essentially necessary in the indictment: and that if it appeared, upon the whole, that the fact was committed with violence, it was sufficient to constitute a robbery. (e) And, with respect to the authority cited, they said that Lord Hale, in the passage referred to, was inaccurate in his expression; that the definition which he gave of robbery was a felonious taking from the person with violence; and that if the fact were so described in the indictment, as to answer the definition, it came up to Lord Hale's own doctrine. (f) It is considered as uncertain whether the indictment should charge that the party was put in *fear*; though, as such statement is usual, it will be more safe to insert it. (g) But, in general,

b Richardson and Greenow (case of), O. B. 1785, cor. Buller, J. 1 Leach 387. The court also said that it was like the *Ipswich* case, where five men were indicted for murder, and it appeared, on a special verdict, that it was murder in one, but not in the other four, but it did not appear which of the five had given the blow which caused the death; and it was ruled that as the man could not be clearly and positively ascertained, all of them must be discharged.

c Pelfryman and Randal (case of), 2 Leach 563.

d 1 Hale 534: where it is said that the in-

dictment must run, *quod vi et armis apud B. in regia via ibidem, &c. 40s. in pecuniis numeratis felonice et violenter cepit a persona*; and, therefore, if the word *violenter* be omitted in the indictment, or not proved upon the evidence, though it be in *alla via regia et felonice cepit a persona*, it is but larceny, and the offender shall have his clergy: and Dy. 224. b. H. 17 Jac. in B. R. 2 Rol. Rep. 154. are cited.

e Smith's case, 2 East. P. C. c. 16. s. 166. p. 783, 784.

f *Id. Ibid.*

g 2 East. P. C. c. 16. s. 166. p. 783.



no technical description of the fact is necessary, if upon the whole it plainly appear to have been committed with violence against the will of the party. (*h*) And where the taking has been by a putting in fear by means of threats to charge the party with sodomitical practices, the indictments appear to have been for robberies in the usual form. (*i*)

It was formerly material to state correctly, in the indictment, whether the robbery was committed in or near the *king's highway*; and many points of much nicety arose as to the manner of such statement, and also as to what should be considered as a highway robbery. (*k*) But the statute 3 W. & M. c. 9. s. 1., relating generally to all robberies, whether in a highway, house, or elewhere, (*l*) makes these points no longer necessary to be considered, particularly in cases falling (as most of them will) within that statute. In a case which occurred soon after the statute was passed, where the indictment was for a robbery near the highway, \*and a robbery in a house was the offence proved, it was holden by all the Judges, that as the statute took away clergy in all robberies, the prisoners should not have their clergy. (*m*) And so upon an indictment which charged the prisoner with robbing a person in a field, near the highway, where the jury found a verdict "guilty of the robbery, but not near the highway," it was holden, by all the Judges, that the prisoner was ousted of clergy. (*n*) And a case is mentioned, as having been determined upon similar principles, where the robbery was in a house in a street, hired by one of the prisoners for the purpose, but not inhabited by any one; and the indictment charged the robbery to have been committed in the dwelling-house of that prisoner. (*o*) It appears, therefore, that it is not material, where the robbery is charged to have been committed in a dwelling-house, that the ownership of the house should be correctly stated. Thus, where the prisoner was convicted upon an indictment, which charged him with robbing a person in the dwelling-house of one Aaron Wilday, and it had not appeared who was the owner of the house in which the fact was committed, the Judges held the conviction proper. (*p*) And again where the prisoner was indicted for robbing a person in the dwelling-house of *Joseph Johnstone*, and it appeared, upon the evidence, that the prisoner, whose name was *Susannah Johnstone*, had committed

Statement of the place where the robbery was committed.

[\*1029]

*h* 2 East. P. C. c. 16. s. 166. p. 733. s. 127. p. 703.

*i* *Jones's*, alias *Evans's*, case, 2 East. P. C. c. 16. s. 130. p. 714. 1 Leach 139, *ante*, 1010. and the other cases of a similar nature, cited *ante*, 1015 to 1024.

*k* 1 Hale 535, 536. 2 East. P. C. c. 16. s. 168. p. 784, 785.

*l* *Ante*, 988.

*m* *Summers's* case, 1705. 2 East. P. C. c. 16. s. 68. p. 785.

*n* *Wardle's* case, 1800. 2 East. P. C. c. 16. s. 168. p. 785.

*o* *Darnford and Newton* (case of), O. B. 1780. 2 East. *Ibid*.

*p* *Pye's* case, *Warwick*, 1790, *cor.* Thompson, B. and in East. T. 1790. 2 East. P. C. c. 16. s. 168. p. 785, 786. 1 Leach 352, note (*a*).



the robbery in the house of her husband, but the Christian name of the husband could not be proved; the prisoner being convicted upon this evidence, the Judges were of opinion that the conviction was proper. (*q*)

Indictment: using the

[\*1030]

maiden

name of the

prosecu-

trix, where

she had

married

after the

robbery,

holden to

be proper.

The verdict

may be,

guilty of

simple lar-

ceny only.

Punish-

ment.

In a case of an indictment for a highway robbery on the person of Elizabeth *Hudson*, it appeared that such was the \*name of the prosecutrix at the time the robbery was committed, but that after the robbery, and at the time the bill was presented to the grand jury, and found by them, she was married to a person of the name of Heywood; and, upon these facts, it was objected that the indictment was erroneous. But Gould, J., and Eyre, C. B., held that the description of the prosecutrix, in this case, by her maiden name, was sufficient. (*r*)

In robbery from the person, as in other complicated or aggravated larcenies, the prisoner may be acquitted of the circumstances of aggravation, namely, the fear or violence, and found guilty of the simple larceny. (*s*)

When the prisoner is found guilty of the robbery, the punishment is capital; the offence being, as we have seen, excluded from clergy by the provisions of several statutes. (*t*)

[\*1031]

## \*CHAPTER THE SIXTH.

### *Of Larceny. (1)*

WE may now consider of the offence called *larceny*, a word formed by contraction, or rather, as it has been said, by abuse, from *latrociny*, *latrocinium*, and used to signify the violation of the property of another by theft, where the pro-

*q* Johnstone's case, 1793, *cor.* Ashhurst, J., and in East. T. 1793. 2 East. P. C. c. 16. s. 168. p. 786.

*r* Turner's case, 1 Leach 536.

*s* 2 East. P. C. c. 16. s. 167. p. 784. But where a special verdict was found, which stated facts amounting only to a larceny, as the only doubt referred to the court was

whether the prisoners were or were not guilty of the felony and robbery charged against them in the indictment; the Judges thought that judgment of larceny could not be given upon such finding. They, therefore, remanded the prisoners to be tried upon another indictment. Rex v. Francis, *ante*, 994.

*t* *Ante*, 987, 988.

(1) MASSACHUSETTS.—In an indictment for larceny and shop-breaking, proof that part of the goods stolen were found in the possession of the defendant, is *prima facie* evidence that he is guilty of the whole charge in the indictment; not only that he stole the whole of the articles taken from the shop, but also of his breaking and entering as alleged in the indictment; unless the defendant give some reasonable account how he came by the goods.—Commonwealth v. Millard, 1 Mass. Rep. 6.

In the case of the Commonwealth v. Trimmer, 1 Mass. Rep. 476, it was

perty is not taken from the house or the person of the owner under such circumstances of aggravation as have been noticed in the preceding chapters of this Book. In cases where the value of the property taken is above twelve-pence, the offence

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decided that a feme-covert is not chargeable for a larceny jointly with her husband. And in the same case, that removing a plank which is loose, and is not fixed to the freehold in a partition wall of a building, is not a breaking within the statute. It appeared also in this case, that the goods stolen were the joint property of Haley and one Emery,—and that in the indictment, they were alleged to be the property of Haley only, whereupon Sedgwick J. said, if the cause proceeded, there must be an acquittal, as a conviction upon this indictment, would be no bar to another prosecution.—The defendants consenting to an amendment of the indictment, the cause proceeded.

In the case of the *Commonwealth v. Brown*, 4 Mass. Rep. 580, it was ruled that if one, to whom a waggon load of goods consisting of several packages, is delivered to be transported from one place to another, fraudulently take away one of the packages, such taking is felony. And per Parsons, C. J. “I am of opinion, admitting the defendant to be a common carrier, and thus to have had a lawful custody of the goods, yet all the goods in the waggon were delivered to him as one mass or body, and his taking away one of the packages, was a separating of a part from the whole, and thus was determined the supposed privity of contract; for the contract with him was not to carry the several packages of which the load was composed, but to carry the load in the state in which it was delivered to him.

“I have thus far considered the defendant as a common carrier, having a special property in, and a lawful possession of, the waggon load. But he was not a common carrier, but a mere servant to drive the team of a common carrier. It would be extremely mischievous to have it understood that every driver of a team, employed to drive the team of a common carrier, has a special property in the load, so that if he drives elsewhere than he was engaged to drive, and takes the whole load, he will be chargeable for an unlawful conversion only, and not for felony.”

Stealing goods in one state, and conveying the stolen goods into another state, is similar to stealing in one county, and conveying them into another, which was always holden to be felony in both counties. *Commonwealth v. Cullens*, 1 Mass. Rep. 116. The same point was decided upon full argument in the case of the *Commonwealth v. Andrews*, 2 Mass. Rep. 14, and in Lord's case, York, June term, 1792,—quoted in Andrews' case.

VERMONT.—A bailee of goods who has the qualified possession of them, is guilty of larceny in privately cloigning and converting them to his own use. *The State v. White*, 2 Tyler's Rep. 352. See also the *State v. Jenkins*, *ibid.* 379, and the *State v. Smith*, *ibid.* 272.

SOUTH CAROLINA.—In the case of the *State v. Wood*, 1 South Carolina Rep. 29, it was ruled that on an indictment for grand larceny, the jury may find petit larceny. Cheeves, J. said “he had been informed by his brethren that the objection (that the indictment being for grand larceny the verdict for petit larceny was unauthorized) had been often over-ruled,” and cited 2 East. P. C. p. 778, where it is expressly so laid down.

TENNESSEE.—An indictment in the county court for petit larceny, in stealing goods of greater value than twelve pence, should conclude against the form of the statute. The second section of the act of 1807 has changed the nature of the offence of petit larceny, viz. that petit larceny shall consist in stealing

is called *grand larceny*; and where the value is only twelve-pence, or under that sum, it is called *petit larceny*. (a) Each [\*1032] of these kinds of larceny is of the \*degree of felony, in each of them the offender is punished by a forfeiture of his goods

a Stat. West. 1. (3 Edw. 1.) c. 15. This statute made regulations as to such offenders as were to be inalienable, and mentions larceny as of two kinds, namely, *grand* and *petit*—*grand larceny*, when the thing stolen is above the value of twelve-pence; and *petit larceny*, when of the value of twelve-pence, or under. Lord Coke, in commenting on this statute, says, that the things stolen ought to be reasonably valued, as the ounce of silver at the making of that act was at the value of twenty-pence, and at the time when he wrote was of the value of five shillings and above. 2 Inst. 189, 190. Twenty shillings at the time of that statute being passed were, in fact, a

pound in weight; and the name of a pound is still retained for the sum of twenty shillings, although the weight of them is so much diminished. And Lord Littleton computes the value of the nominal coin in the reign of Hen. II. as *fifteen* times greater than at the time he wrote. He says, that the pound was really a pound weight of silver, or three times the weight of twenty shillings or a pound sterling now, and so the shilling and the penny weighed three times as much as ours; and then he computes the value of silver, in respect to commodities, to be five times the present value. Hist. Hen. II. Vol. I. p. 470, *et sequ.* And see also Hale Sum. 70. in the notes.

property under the value of ten dollars. At common law it consisted of stealing property under the value of twelve pence. Since the act, the county court possesses jurisdiction of the offence, which should appear by the indictment. 1 Overton's Rep. 107. The State v. Humphries.

In the case of the State v. France, 1 Overton's Rep. 431, it was doubted whether if a person be indicted for stealing the goods of *Harris*, it be sufficient to prove that the owner's name was *Harrison*, but that he was sometimes called *Harris*. In the same case it is said, that in every case affecting life or limb, the accused must not only be present when the evidence is given in, but during the trial, and on the return of the verdict.—(K) This is not the practice in Massachusetts as to the latter circumstance, viz. on the return of the verdict;—cases have frequently occurred, where the prisoner, having been present during the trial, and being under recognizance, absconded while the jury were deliberating, and before they returned into court with their verdict. In such cases the court in that state have proceeded to default the prisoner upon his recognizance, and then take the verdict of the jury. If they pronounce him guilty a *capias* issues, and he is brought in to receive sentence. Those cases usually happening at nisi prius, are not reported; three cases, however, are recollected, viz. Commonwealth v. Cilley for a conspiracy, in Kennebeck, Commonwealth v. Otis for forgery, in Middlesex, and Commonwealth v. Cockrane for adultery, in York. Editor.)

PENNSYLVANIA.—An indictment for stealing bank notes generally, under the description of promissory notes for the payment of money, is bad. It should appear on the face of the indictment, that they are bank notes of some incorporated bank, or in some way that they are lawful notes, no notes of unincorporated banks in Pennsylvania, being at present the subject of larceny. Under the acts of the 30 January, and 19 March 1810 (5 Smith's Laws 81, 108), the notes of unincorporated banks are not the subject of larceny. Spangler v. Commonwealth, 3 Binn. 533. Larceny of one bill or obligation, is within the provision of sect. 5 of the act of 5 April 1790 (2 Smith's Laws, 53), which declares that larceny of bills obligatory, &c. shall be punished in the same manner as larceny of any goods or chattels. Commonwealth v. Messenger & al. 1 Binn. 273. In which cases and upon this point, were cited Plowd. 86. 2 H. H. P. C. 365. 2 East. C. L. 598. 1 Leach 1. S. C. Dubitatur in S. C. 4 Yeates 69. Respub. v. Cleaver & al.

upon conviction, and since the statute 4 Geo. I. c. 11. the minor offence may also be punished by transportation for seven years: but a conviction for grand larceny is still, in some respects, attended with the more serious consequences;

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So long as *wild bees* remain in the tree where they have hived, notwithstanding the tree is upon the land of an individual, and he has confined them in it, they are not the subject of a felony. They are *feræ naturæ* and the taking of them has been considered as a species of hunting. *Wallis v. Mease*, 3 Binn. 646.

In the case of *Pennsylvania v. Bacomb & al.* Addis. 386, it was decided that taking deer-skins hung up in the woods at an Indian hunting camp, may be larceny, though the skins were not in the possession of any one at the time of taking.

As to the indictment and evidence in larceny, the following cases have occurred in Pennsylvania; an indictment for stealing two ten dollar notes of the *President, directors and company, of the United States Bank, &c.* is bad. They should be laid to be promissory notes for the payment of money. *Commonwealth v. Boyer*, 1 Binn. 201.—(See a contrary decision, 1 Mass. Rep. 337, *Commonwealth v. Richards*.) See *Spangler v. Commonwealth*, 3 Binn. 533, and *Commonwealth v. McDowell*, 1 Browne, 360.

An indictment charging that the defendant feloniously did steal, take, and carry away, sundry promissory notes for the payment of money, of the value of eighty dollars, of the goods and chattels of the said A. B. is too vague and uncertain; the notes should be more particularly described, and it should be set forth that the money was unpaid on them. *Stewart v. Commonwealth*, 4 Serg. & Rawle 194.

NEW JERSEY.—If one takes the goods of another out of the place where they are put; for instance, out of a trunk, and lays them on the floor, and is surprised and detected before he goes off, this is larceny. Per Kinsey C. J. in the State *v. Wilson*, 1 Cox's Rep. 441.

NEW YORK.—Taking away a letter from another, which is of no intrinsic value, nor importing any property in possession of the person from whom it was taken, is not larceny, nor any criminal offence. A bond, bill or note was not the subject of larceny at common law; and they certainly had as much value in themselves, as a letter of this description; (1 Hawk. c. 33. s. 22.) The carrying away of such a letter, is therefore, neither "a petit larceny, misdemeanour, breach of the peace, or other criminal offence." *Payne v. The People*, 6 Johns. Rep. 103.

In the case of the *People v. Holbrook*, 13 Johns. Rep. 90, the defendant was indicted for stealing "four promissory notes, commonly called bank notes, given for the sum of fifty dollars each, by the Mechanic's Bank in the city of New York, which were then and there due and unpaid, of the value of 200 dollars, &c. the goods and chattels of Peleg Clark, then and there being found," &c. On the trial of this indictment it was held, that under the statute (1 N. R. L. 174. Sess. 24. Ch. 88), parol evidence of the contents of the bills or notes stolen, is admissible, without accounting for their non production. In trover, no notice to produce the thing sued for, is necessary. 1 Camp. N. P. Cas. 143. 3 Bos. & Pul. 143. 14 East. 274. The notes being supposed to be in the hands of the defendant, of which he is apprised by the indictment, he can produce them if necessary to falsify the proof against him.

It was also decided in this case, that the notes were sufficiently set forth in

as, the judgment for this offence at common law being of death. the offender is put to pray the benefit of his clergy, and a second offence may therefore be followed by capital punishment: and a person convicted of grand larceny will not be a

the indictment. They being in the hands of the defendant, it was impracticable to state them in *hæc verba*. A general description is all that is required in *trover*. Milne's case (2 East. C. L. 602), warrants this indictment. The court say, "it is true that in Craven's case (2 East. 601, where the question again arose) it was determined differently by all the judges; but we think the former decision more reasonable and sound."

It was also held in this case, that the allegation that the notes were the goods and chattels of Peleg Clark, was sufficient, without saying that they were the property of P. C. The word "*chattels*," denotes property and ownership. The statute (1 R. L. 174) enacts, "that if any person shall steal, &c. any bill of exchange, bond, order, warrant, bill or promissory note for the payment of money, &c. being the property of any other person, &c. it shall be deemed and construed to be felony, of the same nature and of the same degree, and in the same manner, as it would have been if the offender had stolen, &c. any other goods of the like value with the money due on such bill, &c. or secured thereby and remaining unsatisfied; and such offender shall suffer such punishment as he, &c. ought to have done, if such offender had stolen, &c. other goods of the like value as aforesaid." See the case of *Sadi v. Morris*, (2 East. C. L. 749,) in which a majority of the judges held it to be improper to lay bank notes to be *chattels*; and the opinion of the dissenting judges in that case. And East's opinion that the case of *Sadi v. Morris* was shaken by the resolution of all the judges in Dean's case, (2 East. C. L. 646.) and other cases, wherein bank notes by the operation of the statute of 2 Geo. II. were holden to be within the statute of Anne, against stealing money, goods, &c. See also 2 Bl. Com. 385, as to the meaning of the word "*chattel*." The result of the opinion of the court in this case was "that, since the statute, it is sufficient to lay in an indictment, that the notes or instruments mentioned in the statute, are the goods and chattels of any person who is intitled to them. And that the word *chattels*, as applied in this case, denotes and signifies property and ownership." 13 Johns. Rep. 94. The court intimated a decided opinion in this case, that a bill of exceptions would not lie in criminal cases. See 1 Caines' Rep. 37, as to the jurisdiction of the Court of Sessions for a second offence of grand larceny.

A *bona fide* finder of an article lost, as a trunk containing goods lost from a stage-coach, and found on the highway, is not guilty of larceny by any subsequent act in secreting or appropriating to his own use, the article found. To constitute larceny, the possession of the goods must have been originally acquired, *animo furandi*. An intention afterwards formed, of converting them to the party's own use, is not felonious. *The People v. Anderson*, 13 Johns. 294. In support of these positions, were cited *Butler's case*, 28th Eliz. 3 Inst. 107, 1 Hale. P. C. 506. 1 Hawk. 208. s. 1. & 2. 2 East. C. L. 663. 1 Hawk. Ch. 33. *Kelyng*, 24. and *Dalton*, 3. *Thompson*, C. J. dissented from this decision, and cited 2 East. C. L. 605, 554, 693. Hawk. P. C. c. 33. s. 9. 1 Bl. Com. 299.

UNITED STATES.—"If any person within any of the places under the sole and exclusive jurisdiction of the United States, or upon the high seas, shall take and carry away with an intent to steal or purloin the personal goods of another," &c. "he shall be fined not exceeding the four fold value of the



competent witness in a court of justice while his disability continues, whereas it is enacted, by the 31 Geo. III. c. 35., that no person shall be an incompetent witness by reason of a conviction for petty larceny. The offences also differ in this respect, that in grand larceny, as in felonies in general, there may be accessories; but there can be no accessories before or after the fact in petit larceny. (*b*)

The definition of the offence of larceny is thus given by an ancient writer. “*Furtum est, secundum leges, contractatio rei alienæ fraudulenta, cum animo furandi, invito illo domino cujus res illa fuerit. Cum animo dico, quia sine animo furandi non committitur.*” (*c*) In subsequent definitions the taking of the property has been stated to be “felonious;” (*d*) which expression has been rendered as signifying a taking *animo furandi*, or, as the civil law expresses it, *lucri causâ*: (*e*) and upon a debate in a case which underwent \*great [\*1033] discussion, one of the Judges is stated to have defined larceny as being “a wrongful taking of goods with intent to spoil the owner of them *causâ lucri*.” (*f*) In a late work of great learning and research, larceny is defined at large to be “the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the

*b* *Ante*, 43.

*c* Bract. Lib. iii. c. 32. p. 150. So Glanvil, in words nearly similar, says, “*Furtum est tractatio rei alienæ fraudulenta, animo furandi, invito illo cujus res illa fuerit.*” Glanv. lib. x. c. 13. And see Brit. c. 15. p. 22. Flet. lib. i. c. 32. p. 54. 3 Inst. 107.

*d* 3 Inst. 107. 1 Hale 503. 1 Hawk. P. C. c. 33. 4 Black. Com. 229.

*e* 4 Black. Com. 232. 2 East. P. C. c. 16. s. 2. p. 553. citing Just. Inst. lib. iv. tit. 1. which, it is observed, seems to go further than the common law in the following definition—*furtum est contractatio fraudulosa lucri faciendi causâ, vel ipsius rei, vel etiam usus ejus possessionisve.*

*f* By Eyre, B. in Pear's case, 2 East. P. C. c. 16. s. 2. p. 553.

property stolen, the one moiety to be paid to the owner of the goods, or the United States, as the case may be, and the other moiety to the informer and prosecutor, and be publicly whipped not exceeding thirty-nine stripes.”—Ing. Dig. 157. “If any person shall feloniously steal, take away, alter, falsify, or otherwise avoid any record, writ, process or other proceedings in any of the courts of the United States, by means whereof a judgment shall be reversed, made void, or not take effect, every such person on conviction thereof shall be fined not exceeding five thousand dollars, or be imprisoned not exceeding seven years, and whipped not exceeding thirty nine stripes.”—Ibid. For the punishment for embezzling military stores, (Ing. Dig. 157) and for knowingly receiving goods and chattels stolen, &c. see *post*, chapters 18 and 21.

What specific articles of property, public and private securities, contracts, &c. and public records, are made the subjects of larceny, depends upon the statute provisions in each of the states, to which the reader must resort for information upon these subjects. To insert the statutes of the several states, in these notes, would extend them to an unreasonable length; and to abridge them might be the occasion of mistakes and misapprehension.—  
Editor.



taker's) own use, and make them his own property, without the consent of the owner." (g) And in a case of recent occurrence which was reserved for the consideration of the twelve Judges, the learned Judge who delivered their opinion said, that the true meaning of larceny is, "the felonious taking the property of another without his consent, and against his will, with intent to convert it to the use of the taker." (h)

It will be attempted to notice the principal points which have been decided concerning the offence of larceny, in an enquiry, I. As to the taking and carrying away of personal goods necessary to constitute this offence; II. As to the personal goods in respect of which it may be committed; III. As to the ownership of the goods; and, IV. As to the indictment, trial, and punishment.

## SECT. I.

### OF THE TAKING AND CARRYING AWAY OF THE PERSONAL GOODS OF ANOTHER NECESSARY TO CONSTITUTE THE OFFENCE OF LARCENY.

Of the actual taking [\*1034] and trespass.

There must be an actual taking or severance of the goods from the possession of the owner, on the ground that larceny \*includes a trespass. If, therefore, there be no trespass in taking goods, there can be no felony in carrying them away. (i) But the taking need not be by the very hand of the party accused: so that if a thief fraudulently procure a person innocent of any felonious intent to take the goods for him, (as if he should procure an infant within the age of discretion to steal the goods) his offence will be the same as if he had taken the goods himself; and it should be so charged. (k)

Any removal of the goods with the felonious intent, is a sufficient carrying away.

It appears to be well settled, that the felony lies in the very first act of removing the property; and therefore, that the least removing of the thing taken from the place where it was before, with an intent to steal it, is a sufficient asportation, though it be not quite carried away. (l) Thus, where a guest who had taken the sheets from his bed, with an intent to steal them, and carried them into the hall, was apprehended before he could get out of the house, it was holden

g 2 East. P. C. c. 16. s. 2. p. 553.

h By Grose, J. in Hammond's case, 2 Leach 1089.

i Kel. 24. 1 Hawk. P. C. c. 33. s. 1. 3 Bac. Ab. *Felony* (C). 2 East. P. C. c. 16. s. 3. p. 554.

k 1 Hale 514. 2 East. P. C. c. 16. s. 3. p.

555. So in the crime of murder, if A. procure B., an idiot or lunatic, to kill C., A. is guilty of the murder as principal, and B. is merely an instrument. *Ante*, 617.

l 3 Inst. 108. 1 Hawk. P. C. c. 33. s. 25. 3 Bac. Ab. *Felony* (D). 4 Black. Com. 231. 2 East. P. C. c. 16. s. 4. p. 555.

that he was guilty of larceny. (*m*) And a like decision was made, where a person who had taken a horse in a close, with an intent to steal him, was apprehended before he could get him out of the close: (*n*) and also, where a person intending to steal plate took it out of a trunk wherein it had been deposited, and laid it on the floor, but was surprised before he could carry it away. (*o*) And in a more modern case it was holden, by all the Judges, that the removal of a parcel from the head to the tail of a waggon, with an intent to steal it, was a sufficient asportation to constitute larceny. (*p*) But where a parcel was not removed, \*its position only being altered on the spot where it lay, the Judges came to a different conclusion. The indictment against the prisoner was, for stealing a wrapper and four pieces of linen cloth; and the facts proved were, that the pieces of linen cloth were packed up in the wrapper in the common form of a long square, and laid lengthways in a waggon; that the prisoner set the package on one end in the waggon for the greater convenience of taking the linen out, and cut the wrapper all the way down for that purpose; but that he was discovered and apprehended before he had taken any thing out of it; and all the judges agreed, upon this case being saved for their consideration, that it did not amount to larceny, though the intention of the prisoner to steal was manifest. They held, that some removal of the goods from the place where they were, was necessary; and that the party accused must, for the instant at least, have the entire and absolute possession of them. (*q*)

[\*1035]

But there must be an entire possession of the goods by the thief, though but for an instant.

In a case where goods in a shop were tied to a string, which was fastened by one end to the bottom of the counter, and a thief took up the goods and carried them towards the door, as far as the string would permit, and was then stopped; this was holden not to be a felony, because there was no severance. (*r*) And in a more ancient case where a thief took from the pocket of the owner a purse, to the strings of which some keys were tied, and was apprehended with the purse in her hand, but still hanging by means of the keys to the pocket of the owner; it was ruled not to be larceny on the ground that as the purse still hung to the pocket of the owner by means of the strings and keys, it was in law still in his possession. (*s*)

And there must be a severance.

[\*1036]

\*But where there has once been a sufficient taking of the goods by the thief, the offence is completed, and will not be

Where there has

*m* 3 Inst. 103. 1 Hale 507. 508.

*n* 3 Inst. 109.

*o* *Simson's case*, Kel. 31.

*p* *Coslet's case*, 1 Leach 236.

*q* *Cherry's case*, *Oxford Lent Ass.* 1781.

and *East. T.* 1781. 2 *East. P. C. c.* 16. s.

4. n. 556. 1 *Leach* 236, 237, note (*a*).

*r* *Anon. cor. Eyre*, B. 2 *East. P. C.* 16. s. 4. p. 556.

*s* *Wilkinson's case*, 1 Hale 508. And see also as to the possession of the property by the thief, in cases of robbery, *Lapier's case*, *ante*, 990. 991. and *Farrel's case*, 990.

been a sufficient taking, the offence will not be purged by returning the goods. Of the *animus furandi*.

purged by a returning of the goods, as has been already shewn in the case of a taking by robbery. (f)

One of the most material considerations respecting the taking and carrying away of goods, necessary to constitute larceny, is whether the fact were done *animo furandi*—“*cum animo dico, quia sine animo furandi non committitur.*” (u) The ordinary discovery of such felonious intent is where the party commits the fact clandestinely, or, upon its being laid to his charge, denies it: but this is by no means the only criterion of criminality; for in cases that may amount to larceny the variety of circumstances is so great, and the complication thereof so mingled, that it is impossible to recount all those which may evidence a felonious intent, or *animum furandi*. It is useful to refer to those points which have already come under consideration: but new cases will continually occur, in which the felonious intent must be left, upon the particular circumstances, to the due and attentive consideration of the court and jury, who will not forget the excellent rule, that in doubtful cases it is proper rather to incline acquittal than conviction. (w)

Cases where the taking is only a trespass.

It is clear that the taking, though wrongful, may only amount to a trespass. Thus, if a man takes away the goods of another openly, before him or other persons, otherwise than by apparent robbery, this carries with it an evidence only of a trespass, because done openly in the presence of the owner, or of other persons who are known to the owner. (x) And the evidence of its being only a trespass will be strong, where a person, having possessed himself of the goods of another, avows the fact before he is questioned. (y) [\*1037] \*Again, if a man leaves a harrow or plough in a field, and another person who has land in the same field uses those instruments, and having done with them, either returns them to the place where they were, or acquaints the owner with his having taken them, this is no felony, but at most a trespass. (z) And the same conclusion must be drawn where a man, having cattle upon a common which he cannot readily find, takes his neighbour's horse which is depasturing on the common, rides about upon it to find his cattle, and, when he has done with it, turns it again upon the common. (a) But the case will not be so clear where the property is taken without the privity or leave of the owner, and no intention to return it is manifested by the party by whom it was taken.

Phillips and Strong's case. The prisoners took two

In a case where two men were indicted for stealing a mare and a gelding, it appeared that the prisoners went to the stables of the prosecutor (who was an innkeeper at a place called Petty France), in the night-time, opened them and took

f *Ante*, 991. And see 2 East, P. C. c. 16, s. 5, p. 557.

u *Ante*, 1032.

w 1 Hale 509. 4 Black. Com. 232.

x 1 Hale 509.

y 2 East, P. C. c. 16, s. 93, p. 661.

z 1 Hale 509. 4 Black. Com. 232.

a 1 Hale 509.

out the mare and the gelding, and rode on them to Lechdale, a place above thirty miles off, where they took them to different inns, and left them in the care of the ostlers, directing the ostlers to clean and feed them, and saying that they should return in three hours: and it appeared also that in the course of the same day the prisoners were taken at a distance of fourteen miles from Lechdale, walking towards Far-  
 ringdon in Berkshire, in a direction from Lechdale. Upon these facts, the jury, having been directed to consider whether the prisoners, when they took the mare and gelding, intended to make any further use of them than to ride them for the purpose of assisting them on their journey towards the place where they were going, and then to leave them to be recovered by the owner or not as it might turn out, found the prisoners guilty; but they added that they were of opinion, that the prisoners meant merely to ride the \*horses to Lechdale, and to leave them there; and had no intention to return for them, or to make any further use of them. At a conference of the Judges this finding was considered; when one of them (b) thought that the case amounted to felony, because there was no intention to return the horses to the owner, but, for ought the prisoners concerned themselves, to deprive him of them: and another of the Judges appears to have entertained doubts upon the case. (c) But the rest of the Judges held it to be only a trespass, and no felony, as there was no intention in the prisoners to change the property, or make it their own, but only to use it for the particular purpose of saving their labour in travelling. They agreed, however, that it was a question for the jury; and that, if the jury had found the prisoners guilty generally upon this evidence, the verdict could not have been questioned. (d)

horses from a stable, rode them to a place at a considerable distance, and there left them, proceeding on their journey on foot; and the jury having found that the horses were taken by the prisoners only in order to [\*1038] ride them, and afterwards leave them, it was holden to be trespass, and not larceny.

A taking of another's property may also be by mistake, arising from heedlessness or accident, in which the *animus furandi* has no part. Thus, if the sheep of A. stray from his flock to the flock of B., and B. drive them along with his own flock, and, by mistake, without knowing or taking heed of the difference, shear them, it is no felony. But if B. knew them to be the sheep of another person, and tried to conceal that fact; if, for instance, finding another's mark upon them, he defaced it, and put his own mark upon them; this would be evidence of felony. (e) And a like conclusion may be drawn, where a party, having possession of another's property, appears desirous of concealing it, or of preventing the inspection of the owner, or of any person who may \*make

The taking may be by mistake, without any *animus furandi*.

[\*1039]

b *Giro e, J.*

c Lord Alvanley. It appears that his lordship, who had been recently called to the bench of C. B. not having been present when the case was first under consideration, declined giving any express opinion. 2 East.

P. C. c. 16. s. 98. p. 663. note (a).

d Philipps and Strong (case of), *cor. Lawrence, J. Gloucester Spr. Ass. 1801.* and East. T. and Trin. T. 1801. 2 East. P. C. c. 16. s. 98. p. 662, 663.

e 1 Hale 506, 507.

the discovery : or where, being asked, he denies having the property, though it is clear that he knew of its being in his possession. (On the other hand, a mode of conduct of a different description in these several respects will be evidence to rebut any felonious intent. (f)

The *animus furandi* may also be negatived by a claim of right.

The circumstance of the goods being taken on a claim of right, may also negative any *animus furandi*. In one instance, indeed, a man may be guilty of felony in taking his own goods : namely, where, having bailed them to another person, he afterwards steals them from such person in order to charge him for them in an action, or robs the other person of them in order to charge the hundred. (g) But regularly a man cannot commit felony of goods wherein he has a property. Thus, if A. take away the trees of B., and cut them into boards : or, if A. take the cloth of B. and make it into a doublet : B. may take the boards or the cloth, and it will not be felony. (h) So if A. take the hay or corn of B., and mingle it with his own heap or cock, or take B.'s cloth, and embroider it : B. may retake the whole heap of corn or cock of hay, at least so much of them as cannot be easily distinguished from his own, and the garment with the embroidery ; and such retaking will be no felony. (i)

If the owner of land upon which a horse has strayed take the horse damage feasant, or if the lord of a manor seize a horse as an estray, though perchance he has no title so to do, yet as the act is not done *fellet animo*, it will not be felony. (k) But any act of this kind is open to proof of a felonious intention : so that if new marks are given to the horse to disguise him, or his old marks are altered, these will be considered as presumptive circumstances of a thievish intent. (l)

[\*1040] \*In a case where, after a seizure of uncustomed goods, some persons broke at night into the house where they were deposited, with a design to retake them for the benefit of the former owner, it was holden that any presumption of a felonious intent to steal, as laid in the indictment, (which was for a burglary) was rebutted by the fact which the jury found, namely, that the prisoners intended to retake the goods on the behalf of their former owner. (m)

On taking corn by gleaning.

The following observations on the subject of a felonious taking of corn by gleaning, are made in a modern work in which much useful matter is collected :—" An idea very universally prevails among the lower classes of the community, that they have a right to glean, that is, to take from off the

f 2 East. P. C. c. 16. s. 97. p. 651.

1 Hale 505. 506.

g 1 Hale 513. 2 East. P. C. c. 16. s. 95. p. 659.

2 East. P. C. c. 16. s. 95. p. 659.

h 1 Hale 513.

k Reg. v. Key (case of.) 2 East.

l 1 Hale 513. 2 East. P. C. c. 16. s. 95. p. 659.

1. C. c. 16. s. 22. p. 510. and c. 16. s. 95. p. 659.

land the corn that remains thereon after the harvest has been gotten in; than which notion nothing can be more erroneous. By custom, indeed, such a right may possibly in some particular places exist; and the laudable kindness of tenants, generally induces them to permit the poor to collect the corn they have left upon the land, and to appropriate it to their own use. As a right, however, it has no more existence than a right to take the tenant's furniture from out of his messuage, and the pillage in the one case is as much felony as the plunder would be in the other: for the act is not simply a trespass, but a felony; and the compiler well remembers a conviction at the Old Bailey, on an indictment found for the exercise of this supposed right. The parties were tried before Mr. Justice Rooke, (if he mistake not) about six years ago." (n)

But upon this it is submitted, that though the right to take corn by gleaning has no existence, except possibly by \*custom in some particular places, (o) such a taking will not necessarily amount to a felony. Undoubtedly it will be an act open, like other acts of trespass which have been mentioned, to proof of a felonious intention, upon which it is peculiarly the province of the jury to determine; but it can hardly be contended, that such taking will amount to larceny, if it should appear to have been merely a taking of the corn left on the ground after the crop had been carried, and to have been done openly, under a claim of right not altogether without colour, though not capable of being established by proof, or to have been done under an apparent sanction, arising from former similar acts of the same individual, or of others in the neighbourhood having been allowed by the occupier of the land. [\*1041]

It has been observed, with respect to cases where goods have been taken on a claim of right, that if there be any fair pretence of property or right in the prisoner, or if it be brought into doubt at all, the court will direct an acquittal; as it is not fit that such disputes should be settled in a manner to bring men's lives into jeopardy. (p) Where there is any doubt as to the right, the court will direct an acquittal.

There is one case in which it has been holden, that the taking will not amount to a larceny, though it be accompanied with the *animus furandi*; namely, where the taking is by a *finding* of the property. Thus, it is laid down in the books, that if one lose his goods, and another find them, though he convert them, *animo furandi*, to his own use, yet it is no larceny, for the first taking was lawful. (q) And again; if A. find the purse of B. in the highway, and take it and carry it away, with all the circumstances that usually prove the *animus fu-* Where the taking is by finding, it will not amount to larceny, even though there be the *animus furandi*. But this doctrine

n Woodf. Landl. and Tenant, Chap. IX. p. 242. (ed. 1814).

o Steele v. Houghton and Wife, 1 Hen. Black. 53. Rex v. Price, 4 Burr. 1926.

p 2 East. P. C. c. 16. s. 95. p. 659.

q 3 Inst. 103. 1 Hawk. P. C. c. 33. s. 2.

3 Bac. Ab. Felony (C).



must be  
[\*1042]  
understood  
with great  
limitation.

randi, as denying it, or secreting it, yet it is not felony. (r) But though, where the particular circumstances \*of any case furnish a presumption of an intended dereliction of treasure trove, or wait, or stray, on the part of the owner, no larceny can be committed by taking them before seizure by the lord; yet in other cases the doctrine of a taking by finding must be admitted with great limitation, and must be understood to apply only where the finder really believes the goods to have been lost by the owner, and does not colour a felonious taking under such a pretence. (s) It will not avail, therefore, where a man's goods being in a place in which ordinarily and lawfully they are or may be placed, a person takes them animo furandi. (t) And, even if the place where the goods are found is not one in which ordinarily they would be deposited, circumstances may shew the taking to have been felonious. Thus, if a man should hide a purse of money in a corn-mow, and his servant finding it should take part of it, the taking will be felony, if it appear by circumstances that the servant knew that his master laid it there; but in such a case it would be required that the circumstances should be pregnant, otherwise it might reasonably be interpreted to be a bare finding, on account of the place being so unusual for such a deposit. (u) And the taking of another man's horse from his own or his neighbour's ground or common, with intent to steal it, is felony. (w)

Cases of  
hackney  
coachmen  
taking arti-  
cles left in  
their  
coaches.  
Lamb's  
case.

Wynne's  
case.

[\*1043]

The following cases also further shew that the taking animo furandi of goods which have been *found* by the party may amount to larceny. A gentleman left a trunk in a hackney coach, and the coachman took and converted it to his own use. This was holden to be felony, on the ground that the coachman must have known where he took up the gentleman and his trunk, and where he set him down; and that he ought therefore to have restored it to him. (x) In a late case, where the prisoner was indicted \*for stealing a box, containing a quantity of wearing apparel and two bonds, it appeared that he was a hackney coachman, and that he took up the prosecutor with several trunks and packages, amongst which was the box in question, at an hotel in the Adelphi, and set him down in Orchard-street, Portman-square, where all the articles were taken out of the coach by the prisoner and the prosecutor's servant, except this box, which was corded, and had been deposited under the seat of the coach. The prisoner received his fare and drove away, after which in a few minutes the box was missed: but the prisoner and the coach were quite gone; and it was not till several days had elapsed, and

r 1 Hale 506.

s 1 Hale 506. 2 East. P. C. c. 16. s. 99. p. 664.

t 1 Hale 506.

u 1 Hale 507.

w 1 Hale 506. 2 East. P. C. c. 16. s. 99.

x Lamb's case, O. B. 1694. 2 East. P. C. c. 16. s. 99. p. 664.

after hand-bills had been dispersed and advertisements inserted in the public-prints, offering a reward to any person who should bring home the box, that the prisoner was apprehended. The box was then found at the house of a Jew, to which the prisoner said he had taken it: but it was uncorded, the hasps of it were forced off, and it contained only a part of the property which was in it when it was lost, the two bonds and several of the articles mentioned in the indictment having been taken away. The case was left to the jury, to consider whether they were satisfied that the prisoner had uncorded the box, not merely from a natural, though idle curiosity, but with an intention to embezzle some part of its contents; and they were of opinion, that he uncorded the box and destroyed the papers with an intent to embezzle the goods found in the box. They accordingly found him guilty; and the case being reserved for the consideration of the twelve Judges, a majority of them were of opinion that the conviction was proper. (y)

Another case of a larceny by a hackney coachman of a parcel left in his coach may be here mentioned, though the circumstances of it appear to have left but little room for the defence that the prisoner obtained the goods by *finding*. \*The prisoner was indicted for stealing a parcel of calico, and other articles the property of Sarah Dixon. The prosecutrix hired him to drive her from her house to a linen-draper's shop, where she purchased the articles named in the indictment; which were tied up in a parcel, and put into the coach. The prisoner then drove the prosecutrix back to her house; and, on getting out of the coach, she ordered him to give the parcel to her servant; but this he neglected to do. The prosecutrix went into the parlour of her house; but returned very shortly to the street-door and paid the coachman his fare; upon which he drove away. Upon the loss of the things being discovered, they were advertised, and a reward offered to any person who should restore them; but without effect. A few days afterwards the prosecutrix met the prisoner; but he denied all knowledge of her person, or of the things, or of his ever having had such a fare, and said that he had only driven the coach two days. The parcel, however, was traced to the prisoner's possession, and it appeared that it had been opened, and three yards taken off from the piece of calico. The prisoner in his defence acknowledged that he had driven the prosecutrix from her house to the linen-draper's and back again; but he denied that she ever desired him to deliver the parcel to her servant. Upon this evidence the prisoner was convicted. (x)

Sears's  
case.

[\*1044]

y Wynne's case, O. B. 1786, cor. Eyre, B. and East. T. 1786. 1 Leach 413. 2 East. P. C. c. 16. s. 99. p. 664. z Sears's case, cor. Ashhurst, J. Old Bailey. 1789. 1 Leach 415, note (b).

Cases of bank notes, &c. found by the prisoners, and converted to their own use.

[\*1045]

Conversion of a large sum of money, with a felonious intent, which was found in a bureau delivered to a carpenter to be repaired.

The doctrine as to a felonious taking of goods, which have been found by the party, was further confirmed in two more recent cases. In the first of these cases it appeared that a pocket-book containing bank-notes had been found by the prisoner in the highway, and afterwards converted by him to his own use. Upon which Lawrence, J. observed, that if the party finding property in such manner knows the owner of it, or if there be any mark upon it by which the owner can be ascertained, and the party, instead of restoring the property, converts it to his own use, such conversion \*will constitute a felonious taking. (a) And in the subsequent case the two prisoners father and son) were convicted of stealing a bill of exchange, upon evidence of their having found and converted it to their own use, by endeavouring to negotiate it. Gibbs, J. stated to the jury, that it was the duty of every man who found the property of another to use all diligence to find the owner, and not to conceal the property (which was actually stealing it), and appropriate it to his own use. (b)

A singular case occurred at no very distant period, of a conversion, with a felonious intent, of a large sum of money found in a bureau, which had been delivered to a carpenter, for the purpose of being repaired. The point arose in the Court of Chancery upon the following facts. Ann Cartwright died possessed of the bureau, in a secret part of which she had concealed nine hundred guineas in specie. After her death Richard Cartwright, her personal representative, lent the bureau to his brother Henry; who took it to the East Indies and brought it back, without the contents of it being discovered. It was then sold to a person named Dick for three guineas, who delivered it to one Green a carpenter, for the purpose of repairing it. Green employed a person named Hillingworth, who found out the money. Hillingworth received only a guinea for his trouble; but, in consequence of his discovery, the whole sum of nine hundred guineas was secreted by Green, by Green's wife, and by one Elizabeth Sharpe, and converted to their own use. On these suggestions Cartwright the personal representative of the original owner of the bureau, filed a bill of discovery against Green and his wife, and Mrs. Sharpe; in which bill Dick joined, but did not claim any of the money on his own account; and the defendants demurred to the bill on the ground that an answer to the discovery sought might subject them to criminal punishment. After the argument [\*1046] \*upon this demurrer, the Lord Chancellor said, that the real question was, whether the bill charged a felony, and that the distinctions upon that point were so extremely nice, that

a Anon. cor. Lawrence, J. Stafford Sum. Ass. 1804, MS.

b Walters, James and Barnabas (case of) cor. Gibbs, J. Warwick Sum. Ass. 1812.

he should not trust himself to say any thing upon them, until he had seen all the cases, and consulted some of the Judges. Some time afterwards his Lordship delivered his opinion, and said—"I have looked into the books, and have talked with some of the Judges and others; and I have not found in any one person a doubt, that this is a felony. To constitute felony, there must of necessity be a felonious taking. Breach of trust will not do. But from all the cases in *Hawkins*, there is no doubt that this bureau being delivered to *Green*, for no other purpose than to repair, if he broke open any part which it was not necessary to touch for the purpose of repair, with an intention to take and appropriate to his own use what he should find, that is a felonious taking, within the principle of all the modern cases; as not being warranted by the purpose for which it was delivered. If a pocket-book containing bank-notes were left in the pocket of a coat sent to be mended, and the tailor took the pocket-book out of the pocket, and the notes out of the pocket-book, there is not the least doubt that it is a felony. . So, if the pocket-book was left in a hackney-coach, if ten people were in the coach in the course of the day, and the coachman did not know to which of them it belonged, he acquires it by finding it certainly; but not being intrusted with it for the purpose of opening it, that is felony, according to the modern cases. There is a vast number of other cases. Those with whom I have conversed upon this point, who are of very high authority, have no doubt upon it." (c)

In cases of this nature, where the taking was by *finding*, some of the strongest circumstances to rebut the implication that such taking was felonious, will be those which shew \*that the party made it known that he had found the property, so as to make himself responsible for the value, in case he should be called upon by the owner; or those which shew that he endeavoured to discover the true owner, and kept the goods till it might reasonably be supposed that the true owner could not be found. (d)

It seems that where there is clearly the *animus furandi* in some of the parties concerned in a felonious taking, it may be negatived as to another party, if it appear that such other party had a different object in view from that of obtaining any share of the stolen property. In a late case, which has been mentioned more at large in a former part of this work, the prisoner, *Donally*, was indicted for a burglary; and, upon the evidence, it appeared that, by a previous concert between himself and some other persons, he *accompanied* three men by whom the fact was committed, and who had been

[\*1047]

It seems that the *animus furandi* will be negatived as to one of the parties in a felonious taking, if it appears that he had a different

c *Cartwright v. Green*, 8 Vez. 405. 2  
Leach 952.

d 2 East. P. C. c. 16. s. 99. p. 665.

object in view from that of obtaining any share of the stolen property.

convicted at a former sessions, not indeed of burglary, because there was evidence of its being day-light at the time of the fact, but of stealing to the amount of forty shillings in the dwelling-house. But though there was sufficient evidence on the present trial that the prisoner Donally *accompanied* these three men while they committed the offence, yet as it clearly appeared that his purpose was only to procure a burglary to be committed by them (according to the previous concert between himself and the other persons,) in order that they might afterwards be apprehended and convicted, and that he might get a share of the reward, it was objected on his behalf, upon the jury acquitting him of the burglary but finding him guilty of stealing in the dwelling-house to the amount of forty shillings, that this could not be larceny in him, because it was not done *animo furandi*. And it is understood that this objection was thought to be well founded by a large majority of the Judges to whose consideration the case was submitted. (c)

[\*1048]

The taking of the goods must be "*invito domino*."

Eggington's case. Some thieves having planned with the servant of the owner to steal some goods, the owner, knowing of the plot, directed his servant to carry on the business, with a view to the detection of the thieves, which the servant accordingly did; and it was holden to be larceny by the majority of the Judges: but one of

\*Besides the *animus furandi* it is necessary that the taking of the goods should also be without the consent of the owner, "*invito domino*." This is of the very essence of the crime of larceny. (f) as it has been already shewn to be essential in one of a similar nature, namely, in robbery. (g)

This material ingredient in the offence of larceny underwent great consideration in a modern case, where the following circumstances were given in evidence against the prisoners, upon an indictment for a burglary and larceny. It appeared that the prisoners, having formed a plan for robbing a manufactory at Soho, near Birmingham, of which Mr. Boulton was the principal proprietor, applied to a man named Phillips, who was employed as servant and watchman to the manufactory, to assist them in the robbery. Phillips assented to their proposal; but immediately afterwards gave information to Mr. Boulton, and told him what was intended, and the manner and time the prisoners were to come:—that they were to go into the counting-house, and that he was to open the door into the front yard for them. Mr. Boulton told him to carry on the business, and that he would bear him harmless; and Mr. Boulton also consented to his opening the door leading to the front yard, and to his being with the prisoners the whole time. In consequence of this information, Mr. Boulton removed from the counting-house every thing but 150 guineas, and some silver ingots, which he marked, in order to furnish evidence against the prisoners; and laid in wait to take them, when they should have accomplished their purpose. On the 23d of December, about one o'clock in the morning, the prisoners

e Donally and Vaughan (case of) *ante*, 40, 41.

f Fost. 123.  
g *Ante*, 995.

came, and Phillips opened the door into the front yard, through which they went along the front of the building, and round into another yard behind it, called the middle yard; and from thence they and Phillips went through a door, which was left open, up a staircase in the centre building, leading to the counting-house and rooms where the \*plated business was carried on: this door the prisoners bolted, and then broke open the counting-house, which was locked, and the desks, which were also locked; and took from thence the ingots of silver and guineas. They then went to the story above, into a room where the plated business was carried on, and broke the door open, and took from thence a quantity of silver, and returned down stairs; when one of them unbolted the door at the bottom of the stairs which had been bolted on their going in, and went into the middle yard; where all (except one who escaped,) were taken by the persons placed to watch them. On this case two points were made for the prisoners; one which has been noticed in a former chapter, that the offence did not amount to burglary, and which was decided in favour of the prisoners; (*h*) the other that no felony was proved, as the whole was done with the knowledge and assent of Mr. Boulton, and that the acts of Phillips were his acts. The prisoners having been convicted, the case was argued before the twelve Judges, a majority of whom held that the prisoners were guilty of the larceny; for that, although Mr. Boulton had permitted, or suffered, the meditated offence to be committed, he had not done any thing originally to induce it; that, his object being to detect the prisoners, he only gave them a greater facility to commit the larceny than they otherwise might have had; and that this could no more be considered as an assent than if a man, knowing of the intent of thieves to break into his house, were not to secure it with the usual number of bolts. They thought also that there was no distinguishing between the degrees of facility a thief might have given to him; that Mr. Boulton never meant that the prisoners should take away his property, and the circumstance of the design originating with the prisoners, and Mr. Boulton's taking no step to facilitate or induce the offence, until after it had been thought of, and resolved on by them, formed, in the opinion of some of the Judges, a very considerable ingredient in the case, and differed \*it greatly from what it might have been, if he had employed his servant to suggest the perpetration of the offence originally to the prisoners. But Lawrence, J. before whom the prisoners were tried, doubted whether it could be said to be done "*invito domino*," when the owner had directed his servant to carry on the business, and meant that the prisoners should be encouraged by the presence of that servant: and

them doubted, on the ground of the owner's assent and partial encouragement-  
[\*1049] ment to the felony by means of his servant.

[\*1050]

*h* .Ante, Chap. on Burglary, p. 917. et sequ.



that by his assistance they should take the goods, so as to make a complete felony; though he did not mean that they should carry them away. (i)

Cases where the taking is by the delivery, or consent of the owner, or of some person having authority to deliver the goods.

Upon some of the doctrines relating to the felonious taking, &c. which have been already mentioned, points of considerable difficulty will sometimes occur: but by far the most nice and intricate questions arise upon the class of cases which are now to be considered, namely, those in which it appears that the goods were taken *by the delivery or consent of the owner, or of some one having authority to deliver them*. The material ingredients in the definition of larceny, already spoken of, must still be kept in mind; particularly that of the *animus furandi*, and the doctrine that the goods must be taken "*invito domino*."

Delivery, where there is no change of property, or of legal possession.

It may, in the first place, be observed, with respect to these cases where the goods are obtained by delivery, that if it appear that, although there is a delivery by the owner in fact, yet there is clearly *no change of property nor of legal possession*, but the legal possession still remains exclusively in the owner, larceny may be committed exactly as if no such delivery had been made.

Cases where there is a bare charge, or custody, or [\*1051] a special use only of the goods.

Thus, if a person, to whom goods are delivered, has only the bare charge, or custody, of them, and the legal possession remains in the owner, such person may commit larceny, by a fraudulent conversion of the goods to his own use. (k) A doctrine which directly applies to the case of servants entrusted with the care of goods in the possession of their masters, as will be shewn more fully, when larcenies by servants are treated of in a subsequent chapter. And larceny may be committed also in a like manner by a person who has a bare special use of goods. Thus, a man may be guilty of larceny in taking a piece of plate, set before him to drink in a tavern; for he has only a liberty to use, not a possession by delivery. (l) So if a weaver, or silk-throwster, deliver yarn, or silk, to be wrought by journeymen, in his house, and they carry it away with intent to steal it, this is felony; the entire property remaining there in the owner, and the possession of the workmen being the possession of the owner. (m) But it would not be felony if the yarn had been delivered to a weaver out of the house, who, having thus the lawful possession of it, had afterwards embezzled it; because by the delivery he had a special property, and not a bare charge, in the same manner as one who is entrusted with the care of a thing for another to keep for his use. (n)

It is stated that, in general, where the delivery of goods is

i Eggington and others (case of), 2 Leach 913. 2 East. P. C. c. 16. s. 101. p. 666.

k 1 Hale 505, 506. 1 Hawk. P. C. c. 53. s. 2 East. P. C. c. 16. s. 109. n. 682.

l 1 Hale 505

m Anon. Old Bailey, 1664. Kel. 35. 2 East. P. C. c. 16. s. 109. p. 682.

n 2 East. P. C. c. 16. s. 109. n. 682, 683. 1 Hawk. P. C. c. 53. s. 2.

for a certain special and particular purpose, the possession is still supposed to reside, unparted with, in the proprietor. (o) And that if a watchmaker steal a watch, delivered to him to clean; or if a person steal clothes, delivered for the purpose of being washed; or goods in a chest, delivered with the key, for safe custody; or guineas, delivered for the purpose of being changed into half-guineas; or a watch, delivered for the purpose of being pawned; in all instances the goods taken have been thought to remain

in the possession of the proprietor, and the taking of them held to be felony. (p) But, unless in these cases *\*the* [1052] *terms* of contract, under which the goods were delivered, are ascertained, by some means, to have been determined (of which will be said hereafter), it seems difficult to see how they are distinguishable, some of them at least, from the cases of a smith, to whom plate is delivered to work or to weigh; or, to whom cloth is delivered that he may make clothes of it; and a friend, who is entrusted with property to keep for the owner's use; in which cases an embezzlement, or conversion of the goods, by the party to whom they are delivered, has been said not to amount to felony. (q) In these latter cases as well as in the former, the delivery of the goods is only for a special purpose; yet it seems that the possession of them has not been considered as remaining with the proprietor, but as having passed to the party by a lawful delivery without fraud, and, therefore, not the subject of a substantial felonious conversion. The distinction, indeed, between a bare charge, or special use of goods, and a general delivery of them, seems to be sufficiently intelligible; and it is consistent with principle that, in the former case, the possession should be considered as remaining in the proprietor; and, in the latter, as having passed to the bailee; and therefore, in the former case larceny may be committed by the person to whom they have been delivered, and in the latter it may not, unless there be a determination of the privity of contract: but it is in the application of this principle to particular cases, that the distinctions seem to be obscure. (r)

In a case where the prisoner was a lodger, and his landlady wanting change for a bank-note, sent it, by her servant, to the prisoner up stairs, begging that he would give her the change for it; when the prisoner, after examining his purse, found that he had not gold enough about him for the purpose, that he would go immediately to his bankers, and get [1053]

Campbell's case. A landlady sends her servant to a lodger with

1 Hawk. P. C. c. 33. s. 9.

1 Hawk. P. C. c. 33. s. 10. and the various cases there cited.

1 Hawk. P. C. c. 33. s. 2. 2 East. P. C. c. 113. p. 693.

2 more upon the cases which relate to

a bare charge of the goods only being given, or a possession of them delivered over, *post*. Sect. 3. in which the *special property* sufficient to constitute an *ownership* of the goods taken is considered; and also *post*, Chan. c. xiv. *On Larceny by Servants*.

a bank-note, requesting him to change it, and he goes away with it. Held, to be larceny.

the note changed; upon which he left the house, with the bank-note in his hand, and never returned; the prisoner appears to have been convicted without any question having been made as to the offence amounting to larceny. (s) But, in this case it probably might have been considered that the landlady did not intend to part with the note without first receiving the change; and if so, that the servant delivered the note to the prisoner without the authority of her mistress, and, therefore, that no legal possession of it ever passed to the prisoner; and that in taking it he was guilty of a trespass. (t)

Delivery where the owner remains present.

It has been suggested as worthy of consideration whether the distinction concerning the legal possession remaining in the owner, after a delivery in fact to another, do not extend to all cases where the thing, so delivered for a special purpose, is intended to remain in the presence of the owner. And it is well advanced, in support of the observation, that in cases of this kind the owner cannot be said to give any credit to, or repose confidence in, the party in whose hands it is so, in fact, placed; and that, the thing being intended to be returned to the owner again, and resumable by him every moment, his dominion over it is as perfect as before; and the person, to whom it is so delivered, has, at most, no more than a bare limited use, or charge, and not the legal possession of it. (u) And though the case of a person, going into a shop, under pretence of buying goods, and, upon their being delivered to him to look at, running away with them; and also that of a person going into a market, and obtaining a horse for the purpose of trying its paces, and then riding away with it, have been considered as felonies, [\*1054] \*on the ground of a preconcerted design to steal the chattels; (x) yet they appear also to be sustainable on the ground that the legal possession of such chattels still remained in the owner of the goods, notwithstanding the delivery, *he continuing present.* (y)

Upon the same principle also, of there being but a bare charge or special use, it has been holden that if the clerk to a banker or merchant have the care of money, or if he have access to it for special and particular purposes, and be sent to the bag or drawer for money, for the purpose of paying a bill, or if he be sent for the purpose of bringing money generally out of the bag or drawer, and, at the time he brings such money, he clandestinely and secretly takes

s Campbell's case. 2 Leach 564. There was a question raised in the case as to the offence amounting to a stealing in the dwelling-house (within the statute 12 Ann. c. 7.), which was noticed *ante*, p. 983.

t By Scarlett, *arguendo*, in Walsh's case. 2 Leach 1079.

u 2 East, P. C. c. 16. s. 110. p. 683.

x 1 Hawk. P. C. c. 33. s. 14, 15. Kel. 82. 2 East, P. C. c. 16. s. 106. p. 677.

y Chisser's case, T. Raym. 275, 276. 2 East, P. C. c. 16. s. 110. p. 633, 684: in which last-cited authority see also the argument in support of this doctrine.

out other money for his own use, he is as much guilty of a felony, as if he had no care of the money, or access whatsoever to the bag or drawer. (z)

It may further be observed, as clearing the ground of enquiry concerning these cases of a delivery of the goods by the owner, that it is a settled and well established principle, that if the owner part with the *property* in the goods taken, there can be no felony in the taking, however fraudulent the means by which such delivery was procured. (a)

Delivery, where the owner parts with the *property* in the goods taken.

The following are some of the cases in which it has been holden that the owner had parted with the *property* in the goods, by his delivery of them to the prisoner.

Upon an indictment for horse-stealing, it appeared that the \*prosecutor was at a fair, having a horse there, in the care of a servant, which he intended to sell. when he was met by the prisoner, to whom he was personally known, and who said to him, "I hear you have a horse to sell; I think he will suit my purpose; and if you will let me have him a bargain I will buy him." The prisoner and the prosecutor then walked together into the fair, towards the horse, and, upon a view of him, the prosecutor said to the prisoner, "You shall have the horse for eight pounds;" and calling to his servant, he ordered him to deliver the horse to the prisoner. The prisoner immediately mounted the horse, saying to the prosecutor, that he would return immediately and pay him. The prosecutor replied, "Very well." The prisoner rode away with the horse, and never returned. Upon these facts, the learned Judge, by whom the prisoner was tried, directed an acquittal; on the ground that there was a complete contract of sale and delivery, and that the *property*, as well as the possession, was entirely parted with. (b)

Harvey's case. [\*1055] The prisoner rode away with a horse from a fair, after it was sold to him, without paying the purchase-money.

In another case, the indictment against the prisoner was for stealing a piece of silk of the value of ten pounds, the goods of Thomas Wilson. Mr. Wilson was a silk manufacturer, in the neighbourhood of *Cheapside*; and it was proved that the prisoner had called at his warehouse, and, after looking at several pieces of silk, had selected the one in question, agreed for the price of it, and said that his name was John Williams, that he lived at No. 6, Arabella-Row, in Pimlico, and that if Mr. Wilson would send it there at six o'clock in the afternoon, with a bill and receipt, he would pay him for it. Mr. Wilson, accordingly, entered the piece of silk in his day-book, to the debit of the prisoner, made out a bill of parcels for it in his name, and sent his

Parkes's case. The prisoner, with a fraudulent intent to obtain goods, ordered a tradesman to send him some, to be paid for on delivery; and, upon the goods being sent

\* Murray's case, O. B. 1784. 1 Hawk. P. C. c. 33. s. 7. 2 East. P. C. c. 16. s. 109. p. 683. 1 Leach 344.  
 a 2 East. P. C. c. 16. s. 102. p. 663. s. 103.  
 VOL. II.

p. 569. s. 113. p. 693.  
 b. Harvey's case, *Chelmsford Sum. Ass.* 1787, *con.* Gould, J. 1 Leach 467. 2 East. P. C. c. 16. s. 103. p. 663.

according-  
ly, gave the  
[\*1056]  
servant,  
who  
brought  
them, bills,  
which  
were mere  
fabrica-  
tions, and  
of no value:  
and it was  
helden not  
to be lar-  
ceny, on the  
ground that  
the servant  
parted with  
the property  
by accept-  
ing such  
payment as  
was offered,  
though his  
master did  
not intend  
to give the  
prisoner  
credit.

shopman with it to the place, and at the hour appointed. The shopman met the prisoner near Arabella-Row, and accompanied \*him to No. 6, where he went with him into a room, and delivered to him the bill of parcels, which he examined; and, after saying it was right, gave the shopman two bills for £ 10. each, drawn by Frith & Co. at Bradford, on Taylor & Co., in London. The amount of the silk was only 12l. 10s.; and the shopman stated that he had not sufficient cash about him to pay the difference between that sum and the amount of the two bills; upon which the prisoner said that it was immaterial, that he should want more goods, and that he would call on the ensuing day at his master's, to look out other goods, and take the change. Upon this the shopman left the goods, and returned home with the bills. The prisoner never came again to Mr. Wilson's warehouse; the bills upon being presented at Taylor & Co.'s, turned out to be mere fabrications; and, on enquiry at No. 6, Arabella-Row, it appeared that the prisoner had only bargained for the lodgings the same morning, and that he absconded with the goods in a few minutes after Mr. Wilson's shopman had left the house. It was also proved that, within a month after the goods had been so obtained by the prisoner, the entry that had been made in the day-book was copied into the journal, and from thence posted regularly into the ledger, in the usual way, where goods were not paid for immediately: and that the prisoner still stood debited in the ledger for the amount. It was objected, upon these facts, by the counsel for the prisoner, that there was a sale of the goods to him, and such a delivery as would *change the property*. Upon which the learned Judge, by whom the prisoner was tried, left it to the jury to consider whether there was not, in the mind of the prisoner, at the very beginning of this transaction, an intention and premeditated plan to obtain the goods without paying for them; and also whether this was a sale by Mr. Wilson, and a delivery of the goods, with intent to part with the *property*, he having received bad bills in payment for them, through the medium of his shopman. The Jury were of opinion that the prisoner, from first to last, intended to defraud Mr. Wilson; and that it was not Mr. Wilson's intention to give him [\*1057] \*credit: and they found him guilty. But the case being afterwards submitted to the consideration of the Judges, they were of opinion that the conviction was *wrong*; for that Mr. Wilson had *parted with the property*, as well as the possession, upon receiving that which was accepted by his servant as payment, although the bills afterwards turned out to be of no value. (c)

c. Parkes's case, O. B. 1794. cor. Mac- c. 16. s. 103. p. 671.  
c. 16. s. 103. p. 671.  
c. 16. s. 103. p. 671.

Upon an indictment against three persons, named Nicholson, Jones, and Chappel, for stealing a bank post bill of twenty pounds, another of fifteen pounds, and also seven guineas, the property of William Cartwright, the following were the material facts given in evidence. Nicholson introduced himself to the prosecutor, who was a pensioner in the Charter-house, by coming to his apartments at that place, and pretending to enquire as to the rules of the charity. He had not before that time any sort of acquaintance with the prosecutor, but he succeeded in getting him to enter into conversation, and to produce the rules of the charity from his desk, which gave Nicholson an opportunity of seeing that the prosecutor had some money. Nicholson then proposed to the prosecutor that they should take a walk together, which they did, and went to a public-house, where they were joined by the prisoner Chappel. Some liquor was called for, when the other prisoner, Jones, came into the room, and said that he had just come from Coventry, for the purpose of receiving a large legacy, and produced a quantity of papers, like bank-notes; upon which Chappel said to him, "Aye, I see it is good, but I imagine you think nobody, in company, has got any money but yourself;" to which Jones answered, "I will lay ten pounds, that neither of you shew forty pounds in three hours." Immediately, on this bet being proposed, the parties left the room; and Nicholson and Chappel both asked the prosecutor if he could shew forty pounds, to which he answered, that he ~~believed~~ he could. Nicholson then accompanied the prosecutor to his room, at the Charter-house, where the prosecutor took out of his desk the two post bills in question, and five guineas, and afterwards took out two more guineas, upon Nicholson advising him to take a guinea or two more: and they then went together to another public-house, called *The Spotted Horse*, where Chappel had previously said, on their leaving the first public-house, that he should go; and where they found both Jones and Chappel in a back room. Jones put down a paper, apparently a £ 10. note, for each who could shew forty pounds, upon which the prosecutor shewed his forty pounds, in the post bills and guineas, by laying them down on the table, but did not recollect whether he took up the £ 10. paper, which was given to him upon his being allowed to have won his wager. The prisoner, Jones, then proceeded to write four letters with chalk on the table; after which he went to the end of the room, turned his back, and said that he would bet them a guinea each that he would name another letter which should be made, and a bason put over it. Another letter was, accordingly, made, and covered with a bason. Jones named a letter, but not the right one; by which the others won a guinea each. Nicholson and Chappel then said, "He is sure to lose: we may

Nicholson's case. The prosecutor having been inveigled by sharpers to bet with them, and suffered by them to win in the first instance, was afterwards stripped of a large sum by losing a bet; and the whole transaction was found by the jury to have been a pre-concerted scheme to get the prosecutor's money: but it was holden not to be a felonious taking, as the prosecutor parted with the [\*1058] property in his money, under an idea that it had been fairly won.



as well make it more, as we are sure to win: we may as well ease him of his money; he has more than he knows what to do with." The prosecutor was so worked up with the hope of gain, that he at length, after various sums being proposed, staked his two post-bills and the seven guineas; after which Jones named a letter, and guessed right; and then went to the table, swept off the bills and money, and went to the door of the room; the other prisoners sitting still, and the prosecutor making no objection, conceiving that he had fairly lost the money to Jones. It happened that just at this time some police officers came to the house, who, upon seeing Jones, ran hastily towards the door, seized him, and brought him back into the room; and, upon perceiving, from the chalks upon the table, what had been going on, took the whole party into custody. Upon searching the

[\*1059] \*prisoners, about eight guineas in cash were found upon them, and a great number of flash notes, but no real ones: and it was afterwards found that a lump of paper, which was put into the prosecutor's hands by Jones when the officers came in, contained the two post bills belonging to the prosecutor.

The prosecutor said, upon his cross-examination, that he did not know whether the paper which was given to him by Jones, on his shewing forty pounds, was a real ten pound note or not; that, he intended to gamble; that, having won the first wager, he should, if the transaction had ended there, have kept the guinea; that he did not object to Jones taking his forty-two pounds seven shillings which he lost; and that, if Jones had guessed wrong the second time, he expected to receive from him forty-two pounds seven shillings, the amount of the stake. Upon this evidence it was contended, on behalf of the prisoners, that this was a mere gaming transaction, or, at most, only a cheat, and not a felony: and the court left it to the jury to consider, whether this were a gaming transaction, or whether it were a preconcerted scheme by the prisoners, or any of them, to get from the prosecutor the post bills and cash. The jury were of opinion, that it was a preconcerted scheme in all the prisoners to get from the prosecutor his post bills and cash; and they found them guilty. But, upon the case being submitted to the consideration of the twelve Judges, they all of them held the conviction wrong; on the ground that in this case *the property* in the post bills and cash was parted with by the prosecutor, under the idea that it had been fairly won. (d)

Coleman's case. The

It appears from another case not to make any difference where the credit may have been obtained by fraudulently using

d Nicholson, Jones, and Chappel (case of), Leach 610. 2 East. P. C. c. 16. s. 103. p. cor. Macdonald, C. B. Old Bailey, 1794, 2 669.

the name of another person, to whom in fact the credit was \*intended to be given, if the delivery of the goods were made by the owner or any other having the disposing power for that purpose. Thus, where the prisoner went to a tradesman's house, and said she came from a Mrs. Cook, a neighbour, who would be much obliged if he would let her have half a guinea's worth of silver, and that she would send the half guinea presently, and thereby obtained the silver, it was holden not to be a felony. (e) And it has been observed with respect to this case, that in truth it was a loan of the silver, upon the faith that the amount would be repaid at another time; that it was money obtained on a false pretence; and that the same determination had been made in similar cases at the Old Bailey. (f)

The prisoner, Phineas Adams, was indicted for stealing a hat, which was stated in one count to be the property of Robert Beer, and in another of John Paul. The substance of the evidence was, that the prisoner bought a hat of Robert Beer, a hat-maker, at Ilminster; that soon afterwards he called for it, when he was told it would be got ready for him in half an hour, but that he could not have it without paying for it. While he was in the shop Beer shewed him a hat which he had made for one John Paul, upon which the prisoner said, that he lived next door to him; and he then asked when Paul was to come for his hat, and was told he was to come that afternoon in half an hour or an hour. The prisoner then went away, saying, he would send his brother's wife for his own hat. Soon after he went away he met a boy, whom (though he did not know him) he asked if he was going to Ilminster; and, upon the boy saying that he was going thither, he asked him if he knew Robert Beer, and said that John Paul had sent him to Beer's for his hat, but that as he owed Beer for a hat himself, which he had not money to pay for, he did not like to go. And he then asked the boy (to whom he had promised something for his \*trouble) to take the message from Paul, and bring Paul's hat to him (the prisoner). He further told the boy not to go into Beer's shop, in case Paul (whom he described by his person and a peculiarity of dress) should happen to be there. The prisoner then accompanied the boy part of the way, after which the boy proceeded alone to Beer's, delivered his message, and received the hat; which, after carrying it part of the way for the prisoner, by his desire, the prisoner received from him, and said he would take it himself to Paul. Upon the fraud being discovered shortly afterwards, the prisoner was apprehended with the hat in his possession. It was objected, on the part of the prisoner, that these facts did not

same rule [\*1060] will prevail though the name of another person be used to procure a delivery by the owner. So that where silver was so obtained, it was holden not to be felony.

Adams's case. Where a hat was obtained under false pretences, by which the owner was induced to part with the property.

[\*1061]

e Coleman's (Catherine) case, O. B. 1785,  
2 East. P. C. c. 16. s. 104. p. 672.

1 Leach 303, note (a).

f 2 East. P. C. c. 16. s. 104. p. 673.

establish a case of larceny; and that the indictment should have been upon the statute for obtaining goods by false pretences. And the jury having found the prisoner guilty, the question was reserved for the opinion of the Judges, who decided that the offence did not amount to a felony; the owner having parted with his property in the hat. (g)

Walsh's case. A stock-broker, after having advised a proprietor of stock as to the proper time for disposing of it, sold the stock for him, and received the proceeds. The principal instructed him to purchase Exchequer bills to the amount; but the broker stating that it was too late to do so on that day, lodged the money with his own bankers, and gave the bankers of his principal a check for the amount. On the following day the principal drew a check on his bankers for a larger sum, and gave it to the broker to purchase Exchequer

In a case of recent occurrence, by which a great deal of interest was excited, the prisoner was charged in the first count of the indictment with stealing twenty-two bank-notes, of the value of a thousand pounds each, and one bank-note of the value of two-hundred pounds, the property of Sir Thomas Plumer; and, in several additional counts, with stealing a written instrument, which, in some of them, was called "a bill of exchange" for the payment of 22,200*l.*, and in others, "a warrant for payment of money." The following facts were proved in support of the charge. The prosecutor, Sir Thomas Plumer, having contracted, in July 1811, for the purchase of a large estate, shortly afterwards consulted the prisoner, who was a stock-broker of eminence, and who had long been employed in that capacity by the prosecutor, as to the most advantageous time to sell out stock, so as to be prepared with the purchase-money about \*the ensuing Michaelmas. The price of stock was then very low, and the prisoner advised that the sale might be delayed as long as possible, which recommendation was adopted by the prosecutor, who requested the prisoner to apprise him from time to time of the variations that might occur in the state of the market. The prosecutor was not called upon to prepare the purchase-money by the time which was first mentioned, as the title to the estate was not then completed; but in the month of October, having reason to believe that the deeds would be ready on or before the ensuing Christmas-day, he communicated that circumstance to the prisoner, and consulted him as to the expediency of disposing of the stock immediately, or letting it remain until the money would be wanted; when the prisoner again advised him to delay the sale. On the 25th of November the prisoner stated to the prosecutor that he then apprehended a fall in the price of stock, and apprized him that the transfer-books at the Bank would shut on the 3d December; and soon afterwards he became extremely urgent with the prosecutor to dispose of his stock immediately, writing to him, and frequently calling upon him for the purpose of giving such advice, and stating, as the reason for his importunity, a probable fall in the price of stock. The prosecutor was influenced by these representations, and also by the concurrent opinion of a commercial gentleman whom he

g Adams's case, *cor. Chambre, J. Taunton* Spr. Ass. 1812, MS. And it seems that the Judges thought the second count out of the

question, as Paul never had possession of the hat.

consulted on the subject; and, on Thursday, the 28th November, gave the prisoner a power to sell out a quantity of stock, which, on the ensuing morning, he contracted to sell for the sum of 21,700*l.* The prosecutor went that morning into the city with the intention of finishing the business; but the prisoner stated that some previous notice must be given to the purchaser to be ready with the money, in consequence of which the prosecutor appointed Wednesday, the 4th December, for making the transfer. On that day the prosecutor attended and transferred the stock, and expressly ordered the prisoner immediately to invest the proceeds in Exchequer bills, and lodge them on his account at his bankers, Messrs. Goslings and Co. in Fleet-street; but the prisoner told him \*that it was then too late to procure Exchequer bills to such an amount, which the prosecutor supposed to be true (though in fact it was not); and therefore left him to receive the 21,700*l.* of the purchaser, desiring that he would pay it into his banker's the same day, which he promised to do, saying at the same time that he would call on the prosecutor the next morning and get his check for such sum as he might choose to have laid out in Exchequer bills. The prisoner accordingly received the 21,700*l.*, paid it into his own bankers, Robarts and Co.'s; and on the same day paid into Gosling and Co.'s his own check on Robarts and Co. for 21,500*l.* on the prosecutor's account. On the following morning, Thursday the 5th December, he called on the prosecutor, and received from him *a check*, (the instrument mentioned in the indictment) on Gosling and Co.'s for 22,200*l.* The prosecutor directed him to go to Gosling's and get the money for it, telling him that it was for the precise and express purpose, and for no other purpose whatever, of laying it out in Exchequer bills; which the prisoner positively promised he would do, and either pay the bills into Gosling and Co.'s, or bring them to the prosecutor by four o'clock on the same day. Nothing was said as to what was to be done with the money in case Exchequer bills could not be purchased. The prisoner then went to Gosling and Co.'s with the check, and there received for it 22,200*l.* in twenty-two bank-notes of 1,000*l.* each, and one bank-note of 200*l.*; and on the same day he purchased with part of that money 6,500*l.* Exchequer bills, which he lodged at Gosling and Co.'s on the prosecutor's account, and took a receipt for them. At about half past four o'clock on the same day, the prisoner called on the prosecutor, and produced the receipt for the exchequer bills, and stated that he had paid the remainder of the money into Gosling and Co.'s, as he had contracted with Coutts and Co. for Exchequer bills to the amount of 15,000*l.*, but that one of the partners of the house of Coutts and Co. was at that time absent from London, had the bills locked up in a drawer, and would not return to deliver them until the following Saturday,

bills. The broker received of the bankers of his principal bank bills for the check, with a part of which he bought Exchequer bills for his principal, and delivered them to his [\*1063] principal's bankers; with a part of the residue he paid for American stock and foreign coin, which he had previously purchased with intention to abscond, and paid away the rest in discharge of other debts of his own; and then absconded. This was considered not to amount to felony; for there could be no stealing of the *check*, as that was delivered to the broker and applied by him as the drawer of it intended; nor of the bank-notes, as they never were in the possession of the prosecutor, and the *property* of them never was

vested in  
him.

\*the 7th December, on which day the prisoner said, he would call again for the prosecutor's check for that amount, and lodge the Exchequer bills for which he had so contracted at Gosling and Co.'s on the prosecutor's account. The prosecutor did not examine the papers delivered to him by the prisoner, during the time the prisoner was with him; but, upon looking at them after he was gone away, he was surprised to find that there was only a receipt for the Exchequer bills, and no receipt for the residue of the money. This circumstance caused suspicion; and an inquiry was almost immediately made, when it was ascertained that the prisoner had, on the afternoon of that same day, set out for Falmouth in the mail-coach, in which he had previously secured a place in a fictitious name; and that he had left a note, addressed to the prosecutor, with his clerk, dated on Saturday the 7th December, and stating that the business respecting Coutts' Exchequer bills could not be finished until the following Monday. This note he had desired might not be delivered till the Saturday. It appeared also that, for some time before he absconded, the prisoner had been labouring under great pecuniary embarrassments, and had meditated an emigration to America; and that about the 29th of November he had applied to an American broker to procure for him American stock to the amount of 11,000*l.*, and stock nearly to that amount was accordingly bought for him, and paid for by him, on the Thursday, the 5th of December, with eleven of the same bank notes of 1,000*l.* each, which he had received for the prosecutor's check: and it further appeared, that several others of the 1,000*l.* notes so received for the prosecutor's check, had been paid away by him to different persons on his own account. It was proved also, that on the same day, Thursday the 5th December, he paid to a dealer in foreign coin 300*l.* for doubloons, which he had contracted for three days before, and which were delivered to him on that day. And further, that he left his country-house at Hackney early on the same morning, in a stage coach, and brought with him a travelling portmanteau of linen and a drab great

[\*1065]

\*coat, which he had contrived to pack up without the knowledge of his family; that he provided himself with some stockings, night-caps, and gloves, at a hosier's in Thread-needle-street, to whom he said that he was going out of town for a few days; and that, after having procured the foreign coin and American securities, he absconded by means of the Falmouth mail. When the route which he had taken was discovered, he was speedily pursued and apprehended at Falmouth, as he was about to get on board a packet for Lisbon, to which place he acknowledged that he intended to go in the first instance, and afterwards take an opportunity of getting to America. On being told the charge made

against him, he delivered up the 11,000*l.* American bank shares, and the bag of doubloons.

Upon this evidence the jury found the prisoner guilty; and also, that he received the check of 22,200*l.* from Sir T. Plumer with a fraudulent design of appropriating a part of its proceeds to his own use: but the case was reserved for the consideration of the twelve Judges.

It was admitted that the "bank-notes" which the indictment charged the prisoner with having stolen, were the bank-notes paid to him by Gosling and Co. in discharge of the prosecutor's check on them payable to him for 22,200*l.*, and that the "bill of exchange" and the "warrant for the payment of money," also charged in the other counts of the indictment were intended to be a description of *that check*.

The learned counsel who argued the case on behalf of the prisoner, after first taking an objection that the check in question was not a security within the statute 2 Geo. II. c. 25. s. 3. contended, that even admitting it to be such a security, yet it was not *stolen* by the prisoner from the prosecutor, as the prosecutor gave it to him for the purpose of his receiving the money for it at the bankers, and of purchasing Exchequer bills with it to the amount; and that as the money *\*was* received for it at the bankers, and Exchequer bills purchased with part of its proceeds, the prisoner could not be charged with having stolen the whole proceeds of the draft. With respect to the charge contained in the first count of the indictment, namely, the stealing of the bank-notes, which he considered to be the principal question in the case, he contended that the *property* of these identical notes never was vested in the prosecutor; that they were received in payment of the check; and that it was not in the contemplation of either of the parties that they should be brought back by the prisoner to the prosecutor. That, supposing the notes could be said to have been at any time the property of the prosecutor, yet that he clearly had parted both with the possession and the property of them to the prisoner; and that in none of the cases where the *property* as well as the possession had been parted with by the owner, as in Nicholson's case, (*h*) and in Colman's case, (*i*) and other cases, it had ever been holden, that a misapplication of things so circumstanced amounted to felony, although in every one of them it was found by the jury that the prisoner had obtained the property fraudulently. And he argued that the present case was exactly analogous to cases of that description.

The Judges took time to advise upon the law of this case, but no opinion was ever publicly pronounced. The prisoner, however, was shortly afterwards liberated. (*k*)

*h* *Ante*, 1057.

*i* *Ante*, 1059.

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*k* Walsh's case, 2 Leach 1054, 1082. 4 Taunt. 258, 284. Though no opinion was



Atkinson's case. The prisoner wrote [\*1067] a letter in the name of another, to a third person, requesting a loan of money, and obtained the money by such means: held that the *property* in the money passed by the delivery of the owner, and therefore that the offence did not amount to felony.

The principle that cases of this description, where the property in fact passes by the delivery of the owner, will fall within the same rule, though the credit may have been \*obtained by fraudulently using the name of another person, (*l*) was further acted upon in the following case. The prisoner was indicted for stealing two bank-notes, the property of William Dunn. The facts were, that the prisoner employed one Dale, to whom he was previously unknown, to carry a letter to the prosecutor, and told him to say to the prosecutor that he had brought the letter from Mr. Broad. He also told Dale to bring the answer to him in the next street, where he would wait for him. Dale carried the letter to the prosecutor, to whom it was directed. It was written in the name of a Mr. Broad, who was a friend of the prosecutor's, solicited the loan of three pounds for a few days, and desired that the money might be inclosed back in the letter immediately. The prosecutor, upon the receipt of this letter, sent the bank-notes in question, inclosed in a letter directed to Broad, which he delivered to Dale, who delivered it to the prisoner as he was first ordered. The letter sent by the prisoner to the prosecutor was altogether an imposition. It was objected on behalf of the prisoner at the trial that this was no felony, because the absolute dominion of the property was parted with by the owner, though induced thereto by means of a false and fraudulent pretence. And the prisoner having been convicted, the case was submitted to the consideration of the Judges who (with the exception of Buller, J. who was absent) held that it was no felony, as it appeared *that the property was intended to pass by the delivery of the owner.* (*m*)

The cases which have been thus cited abundantly establish the proposition first laid down, that where the *property* in the goods taken has been *parted with* by the owner, there can be no larceny.

[\*1068] Delivery, where the owner *does not part with the property*, but only with the *possession*, of the goods.

\*But if the owner has not parted with the *property* in the goods, but only with the *possession* of them, the question of larceny still remains open; and will depend upon the fact, whether, at the time of the alleged felonious taking, the owner had parted with the possession of the goods in such a manner, and to such an extent, as to exclude the idea of trespass. For if the owner of the goods parted with the possession of them without fraud practised by the taker, and if, after the owner had so parted with the possession of them,

ever publicly pronounced, it is understood that the case was argued before ten of the Judges (two being absent on account of illness), who were unanimously of opinion that the facts did not amount to felony. In the same year a statute (the 52 Geo. III. c. 63.) was passed, which relates particularly to frauds and embezzlements by brokers, &c. and will be noticed in a subsequent Chapter.

*l* *Ante*, 1059, 1060.

*m* Atkinson's (James William) case, *cor.* Le Blanc, J. O. B. 1799, and Mich. T. 1799. 2 East, P. C. c. 16. s. 104. p. 673., where it is also said that the Judges considered this case as within the statute 33 Hen. VIII. c. 1. against false tokens; which particularly speaks of counterfeit letters.

nothing was done to determine the privity of contract under which the taker had the possession of them delivered to him, no trespass, and therefore no larceny, can be committed by their conversion.

Upon the subject therefore of larceny, where the owner or person authorized to dispose of the goods has parted with the possession of them by delivery to the party accused, the enquiry seems to resolve itself into two heads; first, Whether the delivery were obtained fraudulently with intent to steal the goods; and if the delivery were not so obtained, then, secondly, Whether the privity of contract were at an end at the time of the conversion so as to amount to a new taking and trespass.

I. The cases in which it has appeared that the delivery of the goods was obtained fraudulently, and with intent to steal them, consist principally of transactions usually described by the term *swindling*, and which have been in most instances carried on by the common arts adopted on such occasions. In a few, however, the more aggravated proceeding has been adopted of getting fraudulent possession of the goods by act of law.

Delivery, where it has been obtained fraudulently, with intent to steal the goods.

The prisoners Samuel Greatrix and John Sharpless were convicted of larceny, in stealing six pair of silk stockings, the property of Owen Hudson: but, a doubt arising as to the propriety of the conviction, the judgment was respited, and the question referred to the consideration of the Judges on the following case. Greatrix, in the character of servant to Sharpless, left a note at the shop of Mr. Hudson, who was a hosier in Bridge-street, Westminster, desiring that he would send an assortment of silk stockings to his master's lodgings at the Red-lamp in Queen-square. Mr. Hudson in consequence took a variety of silk stockings according to the direction. Greatrix opened the door to him, and introduced him into a parlour, where Sharpless was sitting in a dressing-gown, his hair just dressed, and an unusual quantity of powder all over his face. Mr. Hudson unfolded his wares, and Sharpless looked out six pair of silk stockings, the price of which Mr. Hudson told him was fourteen shillings a pair; and he then desired Mr. Hudson to fetch some silk pieces for breeches, and some black silk stockings with French clocks. Mr. Hudson hung the six pair of stockings which Sharpless had looked out, on the back of a chair, and went home for the other goods; but no positive agreement had taken place respecting the stockings. During Mr. Hudson's absence, Sharpless and Greatrix decamped with the six pair of stockings, which were proved to have been afterwards pawned by Sharpless.

Sharpless and Greatrix's case. A hosier by the desire of the prisoner took a variety of silk stockings to his lodgings where the prisoner pretended to purchase some of them, and set them apart from the rest, and then, having sent the hosier to fetch some more articles, decamped with the stockings: this was holden to be larceny.

The Judges were of opinion, that the conviction was right; for the whole of the prisoner's conduct manifested an original

and preconcerted design to obtain a tortious possession of the property; and the verdict of the jury imported, that in their belief the evil intention preceded the leaving of the goods. The Judges thought also that, even independent of the preconcerted design and evil intention, there did not appear to be a sufficient delivery to change the possession of the property. (n)

[\*1070]

Wilkins's case. Where the owner of goods sent them by his servant to be delivered to A., and the prisoner fraudulently procured the delivery of them to himself, by pretending to be A., it was holden to be larceny.

\*The prisoner, John Wilkins, was indicted for stealing a great many pair of stockings, the property of William Wayte. The following were the facts of the case. The prosecutor, Mr. Wayte, who was a hatter and hosier near the Haymarket, delivered two parcels, containing the goods mentioned in the indictment, to his apprentice, with directions to carry them to the house of Mr. Heath, a hosier, in Milkstreet, Cheapside. As the apprentice was going up Ludgatehill, with the parcels under his arm, he was met by the prisoner at the bar, who asked him where he was going? To which the apprentice answered, "To Mr. Heath's." The prisoner, producing a small parcel, replied, "I know your master, and I owe him for those parcels. I was going for them to your shop; therefore do you give me your parcels, and take this back to your master. There is a letter inside, and it must be immediately forwarded to Mr. Brown." The apprentice accordingly consented to the proposed exchange, and delivered the two parcels to the prisoner, and the prisoner delivered his parcel to the apprentice. The prisoner, having effected this exchange, endeavoured to separate himself from the apprentice; but his manner created a slight degree of suspicion in the apprentice's mind, who, to satisfy his doubts, ran after the prisoner, and asked him if he was the Mr. Heath to whose house he was conveying the parcels? The prisoner replied, that he was Mr. Heath; and desired the apprentice to make haste home with the other parcel. The parcel which was delivered by the prisoner contained a collection of old rags of no value; and he was not the Mr. \*Heath he pretended to be. The jury were of opinion that the prisoner, by falsely pretending that he was going to the house of the prosecutor for Mr. Heath's parcels had contrived to make this exchange of parcels with an intent

n Sharpless and Greatrix (case of), (1. B. 1772. 1 Leach 93. 2 East. P. C. c. 16. s. 105. p. 675. In the debate on Semple's case, (2 East. P. C. c. 16. s. 112. p. 692, 693,) a case was mentioned as having been determined very lately by the Judges, where a man ordered a pair of candlesticks from a silversmith to be sent to his lodgings, whither they were sent accordingly, with a bill of parcels by a servant; and the prisoner contriving to send the servant back, under some pretence, kept the goods; and it was ruled to be felony, although they were delivered with the bill of

parcels; such delivery being made under an expectation by the owner of being paid the money; for the jury found that it was a pretence to purchase with intent to steal. Mr. East, however, remarks upon this case, that it must be understood that the prisoner ran away with the goods, or did some other act to denote an intention of withdrawing himself from any account of them; and that no credit was intended to be given him: but that it was meant as a sale for ready money only. 2 East. P. C. *ibid.* note (a).

wrongfully to obtain and convert to his own use the goods mentioned in the indictment; and therefore they found him guilty. The court, however, being doubtful whether, under all the circumstances, the crime amounted to felony, the judgment was respited, and the case referred to the consideration of the twelve Judges, who were unanimously of opinion that the conviction was right. The learned Judge (Gould, J.) who delivered their opinion, said, that it appeared to him that the prisoner's having obtained these goods fraudulently from the apprentice was just the same as if he had obtained them from the actual possession of the master. (o)

The prisoner, Robert Hench, was indicted for stealing a chest and fifty-nine pounds weight of tea, which, in one count of the indictment, were stated as the property of James Layton and W. J. Thompson; and, in another count, as the property of the East India Company. The facts were, that Messrs. Layton and Co., who were tea brokers, had purchased the chest of tea in question, No. 7100, at the East India House, but had not taken it away, when the prisoner, who was in no way employed by them, went thither, and, going up to the place where the request papers were kept, selected one of them, and then proceeded, with the paper in his hand, as if to look for a chest of tea corresponding with the number on the paper. The servant in the India House who had the care of the request papers, seeing him so engaged, went up to him, took the paper which was in his hand, and, seeing the number 7100 upon it, pointed to a chest with a corresponding number, and said that was the chest he wanted; and then returned the paper \*to him, in order that he might go to the permit office, and get a permit. The prisoner then went to the permit office, and shortly afterwards returned with a permit to the India House, where the same servant who had the care of the request papers received the permit from him, and asked him whose partner he was; and, upon his answering "Noton's," returned the permit to him again, and entered the name of Noton in the book. The prisoner then took away the chest of tea. Upon this evidence the jury found the prisoner guilty; when an objection was taken by his counsel, that, as the possession of the property was obtained by a regular request note and permit, the offence could only be considered as a misdemeanor; and the court reserved the point for the consideration of the twelve Judges. But they were clearly of opinion, that the offence amounted to felony. (p)

Hench's case. Fraudulently obtaining a chest of tea from the India House, though by means of a request note and permit, holden to be larceny.

[\*1072]

The prisoner, John Henry Aickles, was indicted for stealing a bill of exchange of the value of a hundred pounds, the property of Samuel Edwards. The following facts appeared

Aickles's case. The prisoner agreed with

o Wilkins's case, O. B. 1769, 1 Leach 520.  
2 East. P. C. c. 16. s. 104. p. 673.

p Hench's case, O. B. Oct. 1810, Hil. T. 1811, MS.

the prosecutor to discount a bill of exchange for him, and the bill was delivered into the prisoner's hands. The prisoner then said, that if the prosecutor would come to his lodgings, he would give him the cash. The prosecutor did not go himself, but sent his clerk, whom he desired not to lose sight of the prisoner till he had got the money. The prisoner contrived to get away from the clerk with the bill, and without paying the money; and this was holden to be larceny; the jury finding a pre-concerted design by the prisoner to get the bill into his possession with intent to steal it.

in evidence. Mr. Edwards, wishing to get his own note of hand discounted, had made application to several persons in the discounting line of business for that purpose. A few days afterwards the prisoner, a total stranger to Mr. Edwards, left an address at his lodgings while he was from home, "Mr. H. No. 21, Great Pulteney-street, from six to seven in the evening, or from eleven till twelve in the morning." In consequence of this address, Mr. Edwards the next morning called upon the prisoner in Pulteney-street; and a conversation upon the subject of money transactions took place between them, when the prisoner told Mr. Edwards that he was in the discounting line, and would, whenever he chose, discount a bill for him at the usual premium of two and a half per cent. agency, provided it was drawn upon and accepted by a person of known credit and responsibility. About three weeks after this interview, Mr. Edwards again called upon the prisoner; but not finding him at home, he sent his clerk the next day, to enquire whether he would discount a bill of one hundred pounds, accepted by Mr. Wells, of Cornhill, and to request that he would call in the city, that he might be fully satisfied of its validity. The prisoner returned with the clerk to the house of Mr. Wells, in Cornhill; where he was shown into a room to Mr. Edwards, who asked him the terms upon which he would discount a bill for one hundred pounds, provided he approved of it. The prisoner answered, that he would do it for two and a half per cent. agency, exclusive of the legal interest for two months. Mr. Edwards immediately delivered the bill described in the indictment into the hands of the prisoner, and referred him to Mr. Wells, the acceptor of it, who was then present, to satisfy himself that it was a genuine acceptance. Mr. Wells said, that the acceptance was his hand-writing. The prisoner then told Mr. Edwards, that if he would go with him to Pulteney-street, he would give him the cash; to which Mr. Edwards replied, that he could not conveniently go himself, but that his clerk should attend him, and pay him the twenty-five shillings agency, and the discount, on receiving the hundred pounds. As the prisoner and the clerk departed, Mr. Edwards whispered the clerk not to leave the prisoner without receiving the money, nor to lose sight of him; and promised to follow them in half an hour. The prisoner and the clerk accordingly proceeded together to the prisoner's lodgings in Pulteney-street. When they arrived, the prisoner shewed the clerk into the parlour, and desired him to wait while he fetched the money: saying, that it was only about three streets off, and that he should be back again in a quarter of an hour. The clerk, however, followed him down Pulteney-street; but, having lost sight of him as he turned the corner of another street, walked backwards and forwards in the street for a length of time, in hope of seeing

him return. The prisoner did not come back again; and the clerk, being joined by Mr. Edwards, went again to the prisoner's lodgings, and both of them waited there three \*nights in the vain expectation of the prisoner's return. A [\*1074] few days afterwards he was taken, and upon his apprehension expressed his sorrow for what had happened, made several apologies for his misconduct, and promised to return the bill.

It was objected by the prisoner's counsel, that these facts did not amount to felony. But the court left the case with the jury to consider, first, Whether they thought that the prisoner had a preconcerted design to get the note into his possession with an intent to steal it; and, secondly, Whether the prosecutor intended to part with the note to the prisoner without having the money paid before he parted with it? The jury found the affirmative of the first, and, the negative of the second question; and concluded that the prisoner was therefore guilty. And this conviction was holden right, upon reference to all the Judges. (q)

The prisoner was indicted for stealing bank-notes to the amount of thirty-five pounds, the property of William Smith, under the following circumstances. The prisoner, being in possession of a quantity of gold coin, went into a room in a public-house, in the neighbourhood of Newcastle-upon-Tyne, when the prosecutor, who was a gentleman's servant, and who had about him notes, belonging to his master, to a considerable amount, happened to come into the same room. Soon afterwards the prisoner took an occasion to make a display of his gold, when a conversation respecting it ensued between him and the prosecutor; the prosecutor expressing a wish that the prisoner would oblige him by letting him have some gold in exchange for notes and silver, not at an advanced price, but at its legal currency. The prisoner stated, that if it would be any accommodation to the prosecutor, and the prosecutor would do him the same kindness on a future occasion, he would let him have some gold for \*his notes and silver; and the exchange took place to a small amount. The prisoner then observed, that if it would be of any material service to the prosecutor, he would procure him a considerable further quantity of gold, if the prosecutor would lay down notes to the amount. Upon this the prosecutor put down thirty-five pounds, in bank-notes, for the purpose of receiving back their amount in gold; and the prisoner took them up, and went out of the house with them, promising to return immediately with the gold. The prisoner did not return; and the prosecutor never saw him again till he was apprehended. Upon these facts, Wood, B. held, that the case clearly amounted to larceny, if the jury be-

Oliver's case. The prisoner offered to accommodate the prosecutor by giving him gold for bank-notes, upon which the prosecutor put down a number of bank-notes for the purpose of their being so exchanged.

[\*1075] The prisoner took up the notes and made away with them. And this was holden to be larceny, if the jury believed that the prisoner intended to

<sup>a</sup> Aickles's case, O. B. 1734, 1 Leach 294. 2 East. P. C. c. 16. s. 106. p. 675.



run away with the notes, and not to return with the gold.

lieved that the intention of the prisoner was to run away with the notes, and never to return with the gold; and that whether the prisoner had, at the time, the *animus furandi*, was the sole point upon which the question turned; for if the prisoner had, at the time, the *animus furandi*, all that had been said, respecting the property having been parted with by the delivery, was without foundation, as the property, in truth, had never been parted with at all. The learned Judge further said, that a parting with the property in goods could only be effected by contract, which required the assent of two minds; but that in this case there was not the assent of the mind, either of the prosecutor, or of the prisoner; the prosecutor only meaning to part with his notes on the faith of having the gold in return; and the prisoner never meaning to barter, but to steal. (r)

[\*1076]

So where it appeared that the prisoners decoyed the prosecutor into a public-house, and there introduced the play of cutting cards; and that one of them prevailed upon the prosecutor (who did not play on his own account) to cut the cards for him; and then, under pretence that the prosecutor had cut the cards for himself, and had lost, another of them swept his money off the table, and went away with it: it was considered to be one of those cases which should be left to the jury to determine *quo animo* the money was obtained, and which would be felony, in case they should find that the money was obtained upon a preconcerted plan to steal it. (s)

In some of the cases of this description the delivery of the goods taken has been only by way of pledge, or security; but the same doctrine will apply if such delivery were obtained fraudulently, and with intent to steal. This will appear from the following case, where the fraud practised was of the kind commonly described by the term *ring-dropping*.

Patch's case. The prisoner, with some accomplices, being in company with the prosecutor, pretended to find a

The prisoner, John, Patch was indicted for stealing a silver watch, steel chain, &c. two pieces of foreign coin, and seven shillings in money, the property of Jos. Bunstead. The evidence of the prosecutor was that the prisoner and two other persons, who made their escape, had joined him in the street; and that, after walking a short space with him, one of them stooped down and picked up a purse, which, upon inspection, was found to contain a ring, and a receipt for 147*l*, purporting to be the receipt of a jeweller for "a

r Oliver's case, cor. Wood, B. *Northumberland* Sum. Ass. 1811, cited by Gurney, arguend. in Walsh's case. 4 Taunt. 274. 2 Leach 1072.

s Horner and others (case of), 1 Leach 270. Cald. 295. S. C. The case was one of an application to the court of King's Bench, to bail their prisoners, on the ground that the

charge against them amounted only to a *misdeemeanor*. Probably it would have been considered as making an essential difference, if the prosecutor had been playing himself at the time, and had parted with his money under the idea that it had been fairly won. See Nicholson's case, *ante*, 1057.

rich brilliant diamond ring." The prisoner proposed that they should go into some public-house to consider in what manner their respective portions of this prize should be divided, and they went accordingly. Various modes of distribution were then suggested: and, at length, the prisoner asked the prosecutor if he would take the ring, and deposit his money and his watch as a security to return it upon receiving \*his portion of its value. The prosecutor assented to this proposal; and signed a written agreement, dictated by the prisoner, to the effect that when the prisoner, or either of the other two men, returned the watch and money, and seventy pounds, he would re-deliver to them the purse and the ring. The prosecutor then laid the watch and money, mentioned in the indictment, upon the table, and received the ring. After which the prisoner beckoned the prosecutor out of the room, upon a pretence of speaking to him in private; and during this interval the other two men went off with the property. The abrupt manner in which they went away made the prosecutor conceive that he had been defrauded; but the prisoner told him not to be uneasy, for he knew the two men very well, and would take care that he should have his money and watch again. The prosecutor, however, secured the prisoner, who then made proposals to him to make the matter up. The ring was valued at ten shillings.

Upon these facts it was objected on behalf of the prisoner, that, as the prosecutor had parted voluntarily with his property, it was a fraud only, and not a felony. But the court referred it to the jury to consider whether the whole transaction was not an artful and preconcerted scheme, in the three men, feloniously to obtain the prosecutor's watch and money; and whether the prisoner and the other two men were not all in concert together to procure, by such a pretext, any man's money whom they might meet, and to embezzle it; or, in other words, to steal it. And the jury found the prisoner guilty. (t)

\*The prisoner, Humphrey Moore, was indicted for stealing twenty guineas and four doubloons, the property of John Field. The prosecutor was walking along the street, when a stranger joined company with him; and, after walking a little way in conversation together, the stranger suddenly stopped, and picked up a purse which was lying at a door. After they had proceeded about forty yards, the stranger proposed that they should go and drink a pot of porter, and

valuable ring. The prosecutor was to have a share of the pretended value of it, [\*1077] and was prevailed upon to deposit his watch, &c. and to take the ring until his share of the value should be paid. The accomplices of the prisoner made off with the watch, &c. It was left to the jury to say whether this was done with a preconcerted plan to obtain the watch, &c.: and the prisoner was found guilty.

[\*1078] Moore's case. Where the prisoner induced the prosecutor to deliver twenty guineas

t Patch's case, O. B. 1732, *cor.* Gould, J. Perrin, B. and Buller, J. 1 Leach 238. 2 East. P. C. c. 16. s. 107. p. 678. It appears that the court proceeded upon the authority of Pear's case (*post.* 1081). And it is stated that their opinion was founded on this, that the possession was obtained by fraud, and the property not altered; for the prosecutor was

to have it again; and that, therefore, it was not like the case of goods sold on credit, where the buyer means immediately to convert them into money, and is not able, nor intends to pay for them; for there the buyer gets the absolute property by the act and consent of the owner. 2 East. P. C. c. 16. s. 107. p. 679.

and four doubloons, by way of pledge for a counterfeit jewel pretended to be found, with intent to steal the money, it was holden to be larceny.

[\*1079]

see what they had picked up. The prosecutor was persuaded to comply; and they accordingly went into a private room, in an adjacent public-house, where the stranger pulled out the purse, and from one end of it produced a receipt, signed W. Smith, for 210*l*. “for one brilliant diamond cluster ring,” and from the other end he pulled out the ring itself. A conversation then ensued upon the subject of their good fortune, during which the prisoner entered the room; when the ring was shewn to him; and, after praising the beauty of its lustre, he offered to settle the division of its value. The stranger lamented that he had no money about him, upon which the prisoner asked the prosecutor if he had any. The prosecutor replied that he had forty or fifty pounds at home, and the prisoner said that such a sum would just do. They all three then went to the prosecutor’s lodgings at Chelsea, where the prosecutor got the money; and they then went to a public-house in the neighbourhood, where the prosecutor put down twenty guineas and four doubloons, which the stranger, in the presence of the prisoner, took up, and in return gave the prosecutor the ring; desiring that he would meet him at the same place, on the next morning at nine o’clock, and promising that he would then return to him the twenty guineas and the four doubloons, and also give him one hundred guineas for his share of the ring. It was also appointed that the prisoner should be there, and agreed that the prosecutor and the stranger should give him a guinea each for his trouble. The prisoner \*and the stranger went away together. The prosecutor attended the next morning pursuant to the appointment, but neither of the other parties came. The ring was of a very trifling value.

It was left with the jury to consider, upon these facts, whether the prisoner and the stranger were not confederated together, for the purpose of obtaining money, on pretence of sharing the value of the ring, and whether he had not aided and assisted the stranger to obtain the money by the means which were used for that purpose. And the jury being of opinion he was so confederated with the stranger, and aiding and assisting him, found the prisoner guilty, subject to the opinion of the Judges whether the offence amounted to felony. The case being submitted to their consideration, and eleven of them being present, the majority (nine of them) were of opinion that the guineas and the doubloons were deposited in the nature of a pledge, and not as a loan; so that, though the *possession* was parted with, the *property* was not; (more especially as to the doubloons, which the prosecutor clearly understood were to be returned the next day in specie) and therefore as the prisoner had obtained them with a fraudulent intent to apply them to his own use, the offence became felony, from the *intention with which he gained the possession*. And they also held that, as

the prisoner and his companion were acting in concert together, they were equally guilty. The other two Judges thought that the doubloons were to be considered as money, and that the whole was a loan on the security of the ring, which the prosecutor believed to be of much greater value than the money he advanced upon it, and that therefore he had voluntarily parted with the *property* as well as the possession. And they said that when money was delivered by a man on such an occasion, it was not in his contemplation to have the same identical money back again. (*t*)

\*The prisoner, John Watson, was indicted for stealing [\*1080] several bank-notes of the value of 100*l.*, the property of John Smith, in his dwelling-house, against the statute 12 Ann. c. 7. The facts were these: Mary Smith, the prosecutor's wife, stated, that as she was going along the street the prisoner stooped down, picked up a small parcel, and said that he had got a prize: upon which she cried, "Halves," and said it was usual to give half of what was found. They went together into St. James's Park, where they examined the parcel in the presence of another man, (who appeared to be an accomplice of the prisoner's,) and found in it a locket with a large stone, and a paper purporting to be the receipt of a jeweller for 250*l.* for a diamond locket. The prisoner said his name was Smith, that he was the captain of a ship, and that he would go to a friend's house, where his cargo was, and bring 100*l.* towards paying the witness her share. He went accordingly, was absent about fifteen minutes, and when he returned, he said that his friend was not at home. After some further proposals respecting the disposal of the locket, it was at length agreed between them, that the locket should be left in the custody of the witness, and that she should deposit 100*l.* in the prisoner's hands as a security to return him the locket the next morning; at which time she was to receive from him half the value of the locket, as mentioned in the receipt found; and she was to have the 100*l.* deposited in the prisoner's hands, as such security as aforesaid, returned back. They then went to the witness's house, where she procured bank-notes to the amount of 100*l.* and laid them on the table, and the prisoner took up the bank-notes, said that they were right, and that he would call the next morning and settle the whole. He then delivered up the locket, went off with the notes, \*and never returned again. The locket was only of the [\*1081] value of five shillings and sixpence.

Watson's case. The prisoner induced a person to deliver bank-notes to him, by the fraud of *ring-dropping*, and upon the usual agreement that the notes should be returned, and the value of the jewel divided. Held to be larceny.

1 Moore's case, O. B. April Sessions, 1784. 1 Leach 314. 2 East. P. C. c. 16. s. 107. p. 679. In Marsh's case, O. B. October Sessions, 1784. 1 Leach 345. a similar question was reserved; and afterwards the prisoner was informed that as his case was exactly

similar to that of Moore, and no ground either in law, or in fact, for making any distinction between them, the Judges had declared their opinion that the taking amounted to a felonious taking: and the prisoner was sentenced to be transported for fourteen years.

Upon this evidence the prisoner was convicted of the simple felony, in stealing the notes: but a case was reserved for the opinion of the Judges upon the objection that this was only a fraud, and not a felony. All the Judges held the conviction proper. (u)

Pear's case. The prisoner hired a horse on the pretence of taking a journey, and almost immediately afterwards sold it. The jury thought that it was hired with the intention of stealing it, and found the prisoner guilty of larceny. And the verdict [\*1082] was approved of by a majority of the Judges after great discussion.

The following is a case which, upon its being submitted to the consideration of the Judges, underwent a great deal of discussion. The prisoner, John Pear, was indicted for stealing a black mare, the property of Samuel Finch. It appeared in evidence, that the prosecutor was the keeper of a livery stable in the Borough, and that the prisoner on the 2d of July 1779, hired the mare of him, for the day, to go to Sutton in Surrey, and back again; and, upon being asked where he lived, said that he lodged at No. 25 in King-street, and that he should return about eight o'clock in the evening. He did not return as he had promised; in consequence of which the prosecutor went next day to enquire for him according to the direction he had given, but could not find any such person. It turned out that the prisoner sold the mare on the afternoon of the same day on which he hired it, in Smithfield market. The learned Judge, by whom the prisoner was tried, left it to the jury to consider, whether the prisoner hired the mare with the intent of taking the journey which he mentioned, and afterwards changed that intention; and directed them that, if they were of opinion that \*he did so, they should acquit him, as in such case the mare must have been sold while the privity of contract subsisted: but he directed them to find the prisoner guilty in case they were of opinion that the journey was a mere pretence of the prisoner's to get the mare into his possession, and that he hired her with an intention of stealing her. The jury found the prisoner guilty, and the point was reserved for the opinion of the judges.

The Judges, after mature deliberation, differed very considerably as to the law of this case. One of them held that it was not felony at common law; because there was no actual taking of the mare by the prisoner. Three others, though they thought that the offence would clearly have been felony by the common law, entertained considerable doubts in consequence of the statutes 33 Hen. VIII. and 30 Geo. II. relating to the offence of obtaining goods by false tokens or false pretences, which statutes make such offences punishable as misdemeanors only. But seven of the Judges were clearly of opinion that the offence was fe-

u Watson's case, O. B. 1794. 2 Leach 640. 2 East. P. C. c. 16. s. 107. p. 680. The case was disposed of by the Judges in Hil. T. 1795, when upon the supposition that the verdict had been taken for the capital offence of stealing in the dwelling-house, (which at

first was thought to have been the case) the Judges all expressed their opinion, that as the notes were in the possession of the prosecutrix, and derived no protection from the house, the case did not fall within the statute, 12 Ann. c. 7. See *ante*, p. 983.

(x) They held that the obtaining possession of the and afterwards disposing of her in the manner stated in the construction of law such a taking as would have the prisoner liable to an action of trespass at the suit of the owner, if he had not intended to steal her; for she delivered to the prisoner for a special purpose only, to go to Sutton, which he never intended to do, but immediately sold her. That in this light the case would be as to what was laid down by Littleton s. 71. who says, "If I lend to one my sheep to dung his land, or my oxen to till the land, and he killeth my cattle, I may have trespass notwithstanding the lending." That if in such a case as would have lain, there could be no doubt but that in such a case, where the felonious intent at the time of obtaining possession was found by the jury, it was felony by common law. (y)

The prisoner George Charlewood was indicted for stealing a bay gelding, the property of John Houseman. The prosecutor was a livery-stable keeper in Crown-street Soho; on the 4th October 1785, the prisoner, who was a post-boy, applied to him for a horse, in the name of a Mr. Eley, saying that there was a chaise going to Barnet, and that Eley wanted a horse to accompany the chaise, to carry it, and to return with the chaise. The gelding demanded in the indictment was accordingly delivered to him by the prosecutor's servant. The prisoner mounted the horse; and, on going out of the stable-yard, and meeting a boy of his, who asked him where he was going, he said he was going no further than Barnet. He accordingly rode towards Tottenham-court-road, which leads to Eley's house. This transaction took place about nine o'clock in the morning; and, between three and four o'clock in the afternoon of the same day, the prisoner sold the gelding in Goodman's Fields for a guinea and a half, including bridle and saddle. The horse appeared to have been ridden very hard, and his knees were broken very badly. The prisoner almost immediately disposed of his bargain for fifty shillings.

In putting this case to the jury it was stated by the Judge, that the Judges in Pear's case, under circumstances as to the present, had determined, that if a jury be satisfied, by the facts proved, that a person, at the time he obtained another's property, meant to convert it to his own

[\*1083]

Charlewood's case. The prisoner obtained a horse under pretence of hiring it to take a journey, and shortly afterwards sold it. Held to be larceny, the jury finding an intent to steal the horse at the time of hiring it.

It is stated also, that Blackstone, J. the Judge who was absent on account of illness, always held that it was felony. 2 East. P. C. c. 16. s. 112. p. 686. in the note. Pear's case, O. B. 1779. 1 Leach 212. 2

East. P. C. c. 16. s. 112. p. 685, in which latter work the judgment (which is stated to have been settled and approved by several of the Judges before it was delivered) is given at large.



\*use, it is felony. That there was, however, a distinction to be observed in the present case, though so nice a one as possibly not to be obvious to common understandings. It was this : that if it appeared to them, that the prisoner at the time he hired the horse, for the purpose of going to Barnet, really intended to go there, but that, finding himself in possession of the horse, he afterwards formed the intention of converting it to his own use, instead of proceeding to the place to which the horse was hired to go, it would not amount to a felonious taking. Another point was also submitted to the consideration of the jury : namely, that although the prisoner really went to Barnet, yet, as he was obliged by the contract to deliver the gelding to the owner upon his return to London, if the jury should be of opinion that he performed the journey, and returned to London, and after such return, instead of delivering the gelding to the owner, converted it to his own use, he was thereby guilty of felony : as the end and purpose of hiring the horse would be then over. The jury found the prisoner guilty on the first point, that he intended to steal the horse at the time he hired it ; and he was afterwards executed. (2)

Simple's case. The prisoner obtained a post-chaise, by hiring.

[\*1085] with an intent to convert it to his own use. And it was holden to be felony, although the contract of hiring was not for any definite time.

Major Simple was indicted for stealing a post-chaise, and the following facts were proved in support of the charge. The prosecutor, Mr. Lycett, was a coachmaker, who let out carriages to hire. The prisoner was a gentleman who lodged in the neighbourhood under the name of Major Harrold ; and had sometimes hired carriages from the prosecutor, as \*he had occasion for them, and had paid for them with punctuality. On the first of September, 1785, the prisoner hired a post-chaise of the prosecutor, saying, that he should want it for three weeks or a month, as he was going a tour round the North. It was agreed that the prisoner should pay at the rate of five shillings a day during that time ; and a price of fifty guineas was talked about, in case he should determine to purchase the chaise on his return to London : but no positive agreement took place between them on the subject of the purchase. In a few days afterwards the prisoner took the chaise from Mr. Lycett's with his own horses, and was driven in it from London to an inn at Uxbridge, where he ordered a pair of horses, and went from thence to Bulstrode, and returned. He then took fresh horses at the same inn at Uxbridge ; but where he went with the chaise afterwards did not appear. But it appeared that he never returned it to Mr.

2 Charles Goddard's case, 1 O. B. 1736. 1 Leach 409, 2 East. P. C. c. 16. s. 112 p. 639. A *quare* is added in 2 East. *Id.* as to the second point to which the attention of the jury was directed ; and the reason given for the doubt is, that part of the contract being *to return the horse to the owner in London*, the contract, if genuine, and valid to the first in-

stance, on the part of the prisoner, would be at an end after his mere return to London. It should seem, that the contract might properly be considered as subsisting, until such a reasonable time after the return to London had elapsed as would have sufficed for bringing back the horse to the stable of the owner.

; and that no tidings could be obtained of him till months afterwards, when he was apprehended on some charge.

As submitted to the court, on behalf of the prisoner, on these facts the offence did not amount to felony; as the case was distinguishable from those of *Pear* (*a*) *Pickles*, (*b*) inasmuch as in those cases the parties had obtained the legal possession of the goods delivered to them; whereas, in the present case, the prisoner had obtained use upon a *contract*, which it was not proved that he broken; as the chaise was not hired for any definite time, or to go to any certain place; and the mere standing that it was for three weeks or a month, for the purpose of making a tour round the North, made no part of the contract. And, even supposing that the contract should not extend beyond the three weeks or a month, it was clear that, during that time at least, the prisoner had the legal possession of the chaise, no intention to convert it wrongfully to his own use arising afterwards, whether by necessity or dishonesty, would make the withholding felony; as the *animus furandi* must exist at the time the felony is obtained. But the court said, that they were guided by the determination of former cases; that it was at length settled that the question of intention was for the consideration of the jury; and that, in this case, if the jury should be of opinion that the original taking of the chaise was with a felonious intent to steal it, and the hiring a mere pretext to enable the prisoner to effectuate that design, without any intention to restore or pay for it, it would fall precluded within the principle of *Pear's* case, and the other decisions which had been made; and the taking would amount to felony. For if the owner only intended to give the prisoner a qualified use of the chaise, and the prisoner had no intention to make use of that qualified possession, but to convert it to his own use, he did not take it upon the contract, and therefore did not obtain the lawful possession of it: but if there were a *bonâ fide* hiring, and a real intention of return at that time, the subsequent conversion of it could not be felony; for by such contract and delivery the prisoner would have acquired the lawful possession of the chaise; in which case his subsequent abuse of that trust would not be

[\*1086]

That as to there being no proof of actual conversion in this case, it was not necessary; but the jury must judge from the circumstances. If the prisoner had staid out three weeks, or two months, and on his return had offered to restore the chaise to the owner, or to pay him for it, such a fact would have been evidence of an honest intention at the time of the hiring. But there was no account given of

it, even up to that moment: that therefore raised a presumption against the prisoner, which it was incumbent on him to repel; and if he could not, the jury would have to consider, from all the facts in proof, whether the taking were with a felonious intent or not. If it were, the case fell directly within the principle which governed that of *Pear's*, from which it could not be distinguished. The court, therefore, left the question of intention to the jury, who found the prisoner

[\*1087]

\*guilty; and he received sentence of transportation for seven years. (c)

Delivery of goods obtained by the fraudulent abuse of legal process.

A delivery of goods obtained by a fraudulent abuse of legal process has been already mentioned as amongst the most aggravated of these cases of larceny where the taking is effected by procuring a delivery of the goods from the owner, or other person authorized to dispose of them. (d) It will generally be a matter of some difficulty to give satisfactory proof of a felonious intent in such a transaction; but if the offence be proved, the severest punishment which it can receive may well be inflicted; for it has been justly observed that such an offence converts the process of the law, which is the best security for property, into an instrument of rapine and plunder. (e)

The books do not furnish many instances of larcenies of this description. But it is laid down that if a person, intending to steal a horse, take out a *replevin*, and having thereby procured the horse to be delivered to him by the sheriff, ride him away; or if a man, intending to steal the goods of another, fraudulently deliver an ejectment, and by obtaining judgment against the casual ejector, get possession of his house, and take his goods; in both these cases the taking will amount to larceny. (f) So if, under pretext or colour of a *capias utlagatum* sued out after an outlawry clandestinely obtained against a visible man, his goods be taken with a felonious intent, it will be felony. (g)

Farr and Chadwick's case.

[\*1088]

Goods obtained by fraudulent ejectment.

In a case of this description, where the prisoners were indicted for breaking the house of R. Stanyer, putting his wife \*in fear, and stealing goods, the following facts were proved. The prisoners intending to rifle a house in which a Mrs. Stanyer lived, apart from her husband, went to an attorney, and pretending that Mrs. Stanyer was tenant to one of them, and in arrear for rent, obtained possession of the house by means of a fraudulent ejectment; and at the same time arrested Mrs. Stanyer, by virtue of a writ of *latitat*, and caused her to be carried to prison. The prisoners then rifled the house, and took away the goods, some of which they hid,

c *Sempie's case*, *cor.* Gould, J. and Adair, Serjt. Recorder, O. B. 1786. 1 Leach 420. 2 East. P. C. c. 16. s. 112. p. 691.

d *Ante*, 1063.

e 1 Hawk. P. C. c. 33. s. 12. 2 East. P. C. c. 16. s. 96. p. 660.

f 3 Inst. 108. 1 Hale 507. Kel. 43. 1 Hawk. P. C. c. 33. s. 12. 2 East. P. C. c. 16. s. 96. p. 660.

g 2 East. P. C. c. 16. s. 96. p. 660. A and see cases of a breaking and entering in burglary, effected by fraud, *ante*. 908.

altered the marks of others, and sold the rest. When they were questioned concerning these acts, and asked what colour of title they had to the house or goods, they could pretend none. And it was proved, that the real landlord had received the rent of the house for many years, and that no rent was in arrear. Neither could the prisoners pretend to any cause of action against Mrs. Stanyer. Upon these facts the jury were directed, that if they believed that the prisoners had done all this with an intent to rob, they ought to find them guilty; which they accordingly did, and both prisoners were executed. (h)

II. Where it appears that the delivery of the goods by the owner, or person authorized to dispose of them, *was not obtained fraudulently*, and with intent to steal, the remaining enquiry will be;—whether the privity of contract, under which the goods were delivered, were at an end at the time of the conversion, so as to amount to a new taking and trespass. (i)

Delivery of the goods obtained without fraud, and subsequent determination of the privity of contract.

If the privity of contract were not determined, the goods will continue in the possession of the party to whom they were delivered by *bailment*; and the general principle of law will prevail, “that if a person obtain the goods of another without fraud, although he have the *animus furandi* afterwards, and convert them to his own use, he cannot be guilty of felony.” (k) A principle which has been holden to extend to the cases of a tailor, who has cloth delivered to him to make clothes with; a carrier who receives goods to carry to a certain place; and a friend who is entrusted with goods to keep for the use of the owner; which they afterwards severally embezzle. (l) And so also if plate be delivered to a goldsmith to work or to weigh, or as a deposit, it has been said that his conversion of it will not be felony. (m) It has, however, been already noticed that some of the cases of this nature seem to make a near approach to those where a bare charge, or mere special use of the goods, is transferred by the delivery, and where, consequently, the legal possession of them remaining exclusively in the owner, larceny may be committed in respect of them, exactly as if no delivery at all had been made. (n)

[\*1089]

In the case of a delivery of a horse upon hire or loan, if such delivery were obtained *boni fide*, no subsequent wrongful conversion pending the contract will amount to felony;

Delivery of a horse, &c. upon hire,

<sup>h</sup> Richard Farr and Eleanor Chadwick (Case of), O. B. 1065, Kel. 43, 44. 2 East. P. C. c. 16, s. 96, p. 660. 2 Leach, 1064, note (a).  
<sup>i</sup> *Ante*, 1068.  
<sup>j</sup> 3 Inst. 107. 2 East. P. C. c. 16, s. 113, p. 693.

<sup>k</sup> Staundf. P. C. 25. 1 Hale 504, 505, 3 Inst. 107, 108. 1 Hawk. P. C. c. 33, s. 2. 2 East. P. C. c. 16, s. 113, p. 693.  
<sup>l</sup> *m* Show 52, *arguend.* and citing 3 Hen. VII 12. 2 East. P. C. c. 16, s. 113, p. 693.  
<sup>n</sup> *Ante*, 1060, *et sequ.*

or loan,  
bond *fidc.*

[\*1090]

Tunnard's  
case.  
Contract of  
loan deter-  
mined.

and so of other goods. (o) But when the purpose of the hiring, or loan, for which the delivery was made, has been ended, felony may be committed by a conversion of the goods. So that if the hiring of a horse be limited to a particular time or place, and after that time has expired, or the party has arrived at the proper place for the re-delivery, he rides away with the horse, and converts it to his own use, it will be larceny. (p) The legal possession, as it follows the right of property, reverts to the original owner as soon as the special property of the holder is determined; and, the \*legal possession being then in the owner, any subsequent taking by the party having the mere holding of the goods, for his own use, will be a trespass, and will amount to a felony if accompanied by a felonious intent to steal.

This doctrine was acted upon in a case where the prisoner was indicted for stealing a mare; and the evidence was that the prosecutor, who lived in the Isle of Ely, lent the prisoner the mare to ride three miles, and the prisoner, instead of riding her three miles only, rode her up to London, and sold her. The court held that this was felony, because the privity of contract was determined after the prisoner had ridden the mare further than the agreement warranted; but that if there had been no such agreement, the privity would have remained, and the riding away would have been no felony: and Lord Raymond, who tried the prisoner, left it to the jury to consider whether the prisoner rode away with the horse with intent to steal it. The jury found him guilty. (q)

Cases of this kind must be considered as proceeding upon an express limitation of the lawful possession of the bailee, and a subsequent unlawful conversion, with intent to steal, taken up after the determination of such prior lawful possession. (r) Thus also in the case of a carrier: if he carry a pack of goods to the place appointed, and deliver, or lay it down, his possession is determined; and if afterwards he carry it away with intent to steal it, this will be a new taking, and felonious. (s)

Leigh's  
case. The  
conversion  
of goods  
holden not  
[\*1091]  
to be felonious,  
on the  
ground that  
the original

In the following case a conversion of goods was holden not to be felonious, on the ground that the original taking was not with intent to steal. The prisoner was indicted for stealing various articles, the property of Abraham Dyer. It appeared that the prosecutor's house, in which was a \*shop containing the muslin and other articles mentioned in the indictment, was on fire; and that his neighbours had, in general, assisted at the time in removing his goods and stock for bet-

o 1 Hale 504. 2 East. P. C. c. 16. s. 114. p. 693.

p Charlewood's case. 1 Leach 409. 2 East. P. C. c. 16. s. 112. p. 689. and s. 114. p. 694. *ante*, 1083.

q Tunnard's case, *cor.* Raymond, C. J.

Denton, J. and Haic, B. Old Bailey, 1729. 2 East. P. C. c. 16. s. 112. p. 687. and s. 114. p. 694. 1 Leach 214. note (a).

r 2 East. P. C. c. 16. s. 114. p. 694.

s 3 Inst. 107. 1 Hale 505.

ter security. The prisoner probably had removed all the articles which she was charged with having stolen, when the prosecutor's other neighbours were thus employed; and it appeared that she removed some of the muslin in the presence of the prosecutor, and under his observation, though not by his desire. Upon the prosecutor's applying to her next morning, she denied that she had any of the things belonging to him; whereupon he obtained a search warrant, and found his property in her house; most of the articles being artfully concealed in various ways. Upon this evidence it was suggested, on behalf of the prisoner, that she originally took the articles with an honest purpose, as her neighbours had done, and that she would not otherwise have taken some of them in the presence and under the view of the prosecutor; and that, therefore, the case did not amount to felony. The court left the case to the jury: telling them that whether the prisoner took the goods originally with an honest intent, was a question of fact for their consideration: but that even if they were of opinion that she did take them with an honest intent, yet her afterwards hiding them in the various ways proved, and denying that she had them, in order to convert them to her own use, would still support the indictment. The jury, upon this direction, found her guilty; but said that, in their opinion, when she first took the goods from the shop she had no evil intention, but that such evil intention came upon her afterwards. And the case being submitted to the consideration of the Judges, they held the conviction wrong; and were of opinion that upon this special finding there was no felonious taking, but merely a breach of trust: some of them, however, thought that it might have been left strongly with the jury that the subsequent conduct marked the original intention. *t*)

taking was not with intent to steal.

\*The privity of a contract may be determined before its regular completion by the tortious acts of the bailee.

[\*1092]

A. delivers the key of his chamber to B., who unlocks the chamber and takes the goods of A. with intent to steal them. This has been holden to be felony, for the reason that the goods were not delivered to B. but taken by him; a judgment which appears to have proceeded upon the ground that, by the delivery of the key in this case, it was not in the contemplation of the parties to make a delivery of the goods contained in the room. (*u*) But supposing the key to have been delivered for the purpose of entrusting the party with the care of the goods; still, according to a very good opinion, the taking of the goods out of the room, with a felonious intent, might have been felony; on the ground that, by the act of taking the goods with such an intent out of the room in which

Privity of contract determined, after delivery, by the tortious acts of the bailee.

*Leigh's case*, cor. Lord Eldon, *Wells Sum.* 1800. and considered by the Judges  
(Lawrence, J. being absent), *11 Mich. T*

1800. 2 East. P. C. c. 16. s. 114. p. 694. 2-  
Leach 411, note (*a*), and MS.  
*u* 1 Hale 505.



they were intended to remain for safe custody, the privity of the contract would have been determined in the same manner as if they had been delivered in a box, and taken out of it afterwards. (*x*)

Carrier,  
weaver,  
&c. taking  
part of the  
goods deli-  
vered to  
them.

Upon the same principle of a determination of the privity of contract by a tortious act of the bailee, it has been holden, that if a carrier open a pack and take out part of the goods, or a weaver take part of the silk which he has received to work, or a miller take part of the corn which has been delivered to him to grind, such takings, if with a felonious intent, will be felony. (*y*)

Distinction  
in the car-  
rier's case.

[\*1093]

With respect, however, to a conversion of goods by a carrier, a notable distinction should be observed, namely, that though if a carrier, to whom a package of goods is delivered to take to a certain place, open the package and take out part of the goods, it will be a felonious taking; yet it will \*be no felony if he take away the whole package. (*z*) The doctrine seems indeed to savour a little of contradiction, (*a*) and has been considered as standing more upon positive law not at this time to be questioned, than sound reasoning. (*b*) The distinction appears to have proceeded upon the ground that the act of breaking the package is an act of trespass in the carrier by which the privity of contract is determined; whereas, if there be no breaking of the package, no severance of part of the commodity from the rest by the carrier, but the whole of it be parted with by him in the state in which it was delivered to his hands, there will be nothing which will amount to a trespass while the package remains in his possession. And, if this be the true principle of the distinction, it does not seem to make any difference, where there is such a breaking of the package, whether the carrier take the whole or a part only of its contents. (*c*)

It should be mentioned, that in a book of high authority a different principle is assigned for this distinction, namely, that the subsequent act of the carrier, in opening the goods and disposing of them to his own use, "declareth that his intent originally was not to take the goods upon the agreement and contract of the party, but only with a design of stealing them." (*d*) But it is well observed, that though such previous intent may appear from the evidence in particular

*x* 2 East. P. C. c. 16. s. 111. p. 685.

*y* 3 Inst. 107, 108. 1 Hale 505. 1 Hawk. P. C. c. 33. s. 4.

*z* 3 Inst. 107. 1 Hale 504. 1 Hawk. P. C. c. 33. s. 2. 4.

*a* See Kel. 83. where the learned reporter says, "I marvel at the case put 13 Edw. IV. 9, b. that if a carrier have a tun of wine delivered to him to carry to such a place, and he never carry it, but sell it, all this is no felony; but if he draw part of it out, above

the value of twelve pence, this is felony. I do not see why the disposing of the whole should not be felony also." As to the part of this passage—"above the value of twelve-pence," there seems to be no reason why, if a taking to that amount would be grand larceny, a taking to the value of twelve pence, or under, might not be petit larceny.

*b* 2 East. P. C. c. 16. s. 115. p. 695.

*c* 2 East. P. C. c. 16. s. 15. p. 697.

*d* Kel. 82.

cases; yet, if it were to be inferred from the \*mere fact of the carrier's embezzling the goods, there would be an end of the distinction itself; for if the taking of goods out of the package be evidence of the carrier's having originally intended to take the goods, not upon the agreement, but with intent to steal them, *à fortiori* the taking the whole package of goods, whether broken or not, and converting it, must be evidence of such intent. (e)

It will be material, therefore, in cases where goods are charged to have been stolen by a carrier, to shew that the package in which they were contained was broken or opened by him; but what will amount to sufficient evidence of that fact will depend of course upon the circumstances of each particular case, and will be peculiarly within the province of the jury to determine. In a case where a woman had entrusted a porter to carry a bundle for her to Wapping, and went with the porter, and in going to the place the porter ran away with the bundle, which was lost; it is reported that a very learned Judge, after telling the jury that if they thought that the porter opened the bundle and took out the goods it was felony, and they ought to find him guilty, further declared it to be his opinion, that the facts, as they have been above stated, were evidence of his having opened the bundle and taken out the goods. (f) But it has been doubted, with great propriety, whether upon the facts, as thus stated, the evidence was sufficient to warrant the jury in finding that the porter opened the bundle, and took out the goods; (g) and there certainly seem to be better grounds upon which this case might have been decided. (h)

## \*SECT. II.

[\*1095]

### OF THE PERSONAL GOODS IN RESPECT OF WHICH THE OFFENCE OF LARCENY MAY BE COMMITTED.

In pursuing this part of the enquiry respecting the offence of larceny, there seem to be three points which more particularly require consideration; I. Whether the goods taken were in any way *part of the freehold*; II. Whether they consist of *written instruments*; and, III. Whether they consist of *animals, birds, or fish*.

c 2 East. P. C. c. 16. s. 115. p. 696, 697.  
f *Assn. cor.* Holt, C. J. O. B. 1701, 2 East.  
P. C. c. 16. s. 115. p. 697. 1 Leach 415.  
see (a).

g 2 East. P. C. c. 16. s. 115. p. 97.

h It is stated to have been suggested, in 2 MS. Sum. 235., that a ground for the determination in this case might have been, that all

the circumstances of it shewed that the porter took the bundle at first with intent to steal it; and also to have been suggested by some of the Judges, in the argument on Pear's case (*ante*, 1081.) that the bundle, though delivered, being intended to continue in the owner's presence, was, in point of law, in her possession. 2 East. P. C. c. 16. s. 115. p. 697, 698.

By the common law, larceny cannot be committed of things that are part of the freehold.

[\*1096]

But they become the subjects of larceny by being severed.

I. By the common law, larceny cannot be committed of things which savour of the realty, and are, at the time they are taken *part of the freehold*; whether they be of the substance of the land, as lead, or other minerals; of the produce of the land, as trees, corn, grass, apples, or other fruits; or things affixed to the land, as buildings, and articles, such as lead, &c. annexed to buildings. (i) The severance and taking of things of this description is, at common law, only a trespass. One reason for which doctrine (though it does not apply to the whole of the articles which have been enumerated) is said to be, that things which are a part of the freehold, being usually more difficult to remove, are less liable to be stolen: (k) possibly also the doctrine may have proceeded upon certain subtilties in the legal notions of our ancestors; (l) and it may perhaps in some measure have originated in the greater security from *\*private depredations* of the things which were part of the freehold, than of those which were merely personal, in the earlier times, when articles of provision and other personal chattels (frequently the most valuable) were carried from place to place by the individual tenants, in that attendance in the camp which was exacted by their military tenures. (m)

But things, though they savour of the realty, may become the subjects of larceny by being severed from the freehold: thus, if stones be dug out of a quarry, wood be cut, fruit be gathered, or grass be cut, larceny may be committed of them. (n) And this will be the case, not only when they have been severed by the owner, but also by the thief himself, if there be an interval between his severing and taking them away; so that it cannot be considered as one continued act. If therefore the thief sever them at one time, whereby the trespass is completed, and they are converted into personal chattels in the constructive possession of him on whose soil they are left or laid, and come again at another time when they are so turned into personalty and take them away, it is larceny. (o) Thus though, “if a thief severs a copper, and instantly carries it off, it is no felony at common law; yet if he lets it remain, after it is severed, any time, then the removal of it becomes a felony, if he comes back and takes it: and so of a tree which has been some time severed.” (p)

i 3 Inst. 109. 1 Hale 510. 1 Hawk. P. C. c. 33. s. 34. 3 Bac. Ab. *Felony* (A). 4 Black. Com. 232. 2 East. P. C. c. 16. s. 27. p. 587.

k 1 Hawk. P. C. c. 33. s. 34. 2 East. P. C. c. 16. s. 27. p. 587.

l 4 Black. Com. 232.

m 3 Bac. Ab. *Felony* (A).

n 3 Inst. 109. 1 Hale 510.

o 1 Hawk. P. C. c. 33. s. 34. 4 Black. Com. 232. 2 East. P. C. c. 16. s. 27. p. 587. And so in 1 Hale 510., it is said, “But if a man come

to steal trees, or the lead of a church or house, and sever it, and, after about an hour's time, or so, come and fetch it away, this hath been held felony, because the act is not continued but interpolated, and in that interval the property lodgeth in the right owner as a chattel; and so it was agreed by the court of King's Bench, 9 Car. I. upon an indictment for stealing the lead of Westminster Abbey.” Dalr. 103. p. 166. (new edit. c. 156. p. 501.)

p Per Gibbs, Ch. J. *Lee v. Ridson*, M. 57 Geo. III. 7 Taunt. 191.

\*This being the common law, and many of the descriptions of property which come within this notion of a connection with the freehold being thereby placed in a very precarious and unprotected situation, the legislature has from time to time interfered for their protection, and made the wrongful taking of them in some instances felony, and in others a minor offence, punishable by summary proceedings before a magistrate.

Statutes making it penal to take wrongfully things that are part of the freehold.

The statute 25 Geo. II. c. 10. enacts that "all and every person or persons, that shall unlawfully break or by force enter into any mine or mines, wad-hole or wad-holes of wad or black cawke, commonly called *black lead*, or into any pit, shaft, adit, or vein of wad, black cawke or black lead, with an intent to take and carry away from thence any wad, black cawke or black lead; or shall unlawfully from thence take and carry away any wad, black cawke or black lead, although such mine or mines, wad-hole or wad-holes, pit, shaft, adit, or vein, be not actually broke, or by force entered into, by such offender or offenders; or shall aid, abet, assist, hire, or command any person or persons to commit such offence or offences as aforesaid;" shall be deemed guilty of felony; and being convicted, may be committed to the prison or gaol of the county, or to some house of correction within the county, for a time not exceeding one year, there to be kept to hard labour, and to be publicly whipt by the common hangman, or by the master of such house of correction, at such times and at such places, and in such manner, as the court or Judge shall think proper; or the court or Judge, or any other subsequent court held at the same place, with the like authority as the former, may order such offenders to be transported for a term not exceeding seven years. The statute then further enacts, that "if transportation shall be directed, the same shall be executed in such manner, as is or shall be provided by law, for the transportation of felons; and if any such person or persons so committed or transported, shall voluntarily escape or break prison, \*or return from transportation before the expiration of the time for which he, she, or they shall be ordered to be transported, as aforesaid, such person or persons being thereof lawfully convicted, shall suffer death as a felon, without benefit of clergy; and shall be tried for such felony in the county where he, she, or they so escaped, or where he, she, or they shall be apprehended."

25 Geo. II. c. 10. Persons breaking into mines of *black lead*, or taking lead, &c. from thence, or aiding therein, guilty of felony;

And punished by imprisonment and whipping;

Or by transportation.

[\*1098] And escape or return from transportation is made felony without benefit of clergy.

The 39 and 40 Geo. III. c. 77. s. 5. gives certain summary proceedings in cases of depredations committed upon *coal, culm, &c.*; but it appears to apply only to the taking of these articles when *severed*, which is an offence punishable more severely as a larceny at common law. It enacts (amongst other provisions for the better security of collieries) that if any person shall steal and take away any coal, culm, coke, wood, iron, ropes, or leather, not exceeding the value of five

39 and 40 Geo. III. c. 77. s. 5. Stealing coals, &c. made punishable by summary proceedings before a justice.

shillings, from any place belonging to any manufacturer or coal dealer, or from any boat, barge, waggon, cart, or other carriage carrying the same; or shall steal, break, destroy, damage or embezzle any tools or implements for getting coal or minerals not exceeding the above value, and shall, on the complaint of the owner or his agent, be convicted, either by confession or the oath of one witness, before one justice, he shall for the first offence forfeit not exceeding ten shillings, over and above the costs, which, if not paid, he shall be committed to the house of correction to hard labour for one month, or until the penalty and charges be paid; and for the second offence, shall forfeit not exceeding twenty shillings over and above the costs, and upon non-payment shall be committed to the house of correction to hard labour for three months, or until such penalty and charges be paid; and for the third, or any future offence shall forfeit not exceeding forty shillings over and above the charges to be ascertained by such justice, and upon non-payment shall be committed to the house of correction to hard labour for six months, or until such penalty and charges be paid. The same section provides also, that no person who shall be convicted of any offence against

[\*1099] \*this act shall be prosecuted for the same offence under any other law.

4 Geo. II.  
c. 32.  
Stealing  
lead and  
iron affixed  
to  
houses,  
&c. made  
felony,

And punishable by  
transportation.

And persons aiding, &c. or receiving such lead, iron, &c. knowing it to be stolen, are made liable to the same punishments as if they had stolen the same.

The statute 4 Geo. II. c. 32. relates to the stealing of lead and iron fixed to houses, or other buildings and places adjoining, the prevalence of which pernicious practice is recited in the preamble. It enacts "that all and every person and persons who shall steal, rip, cut, or break with intent to steal, any *lead, iron bar, iron gate, iron palisadoe, or iron rail* whatsoever, being fixed to any dwelling-house, out-house, coach-house, stable, or other building used or occupied with such dwelling-house, or there-unto belonging, or to any other building whatsoever, or fixed in any garden, orchard, court-yard, fence, or outlet, belonging to any dwelling-house or other building, shall be deemed and construed to be guilty of felony;" and shall be subject to the like pains and penalties as in cases of felony; and that the court may transport such felons for the space of seven years. And enacts also, that "all and every person and persons who shall be aiding, abetting, or assisting in stealing, or in such ripping, cutting, or breaking any lead, iron bar, iron gate, iron palisadoe, or iron rail, fixed to any dwelling-house, out-house, coach-house, stable, or other building; or fixed in any garden, orchard, court-yard, fence, or outlet, belonging to any dwelling-house, or other building: or who shall buy or receive any such lead, iron bar, iron gate, iron palisadoe, or iron rail, knowing the same to be stolen, shall be subject and liable to the same punishments as if he, she, or they had stolen the same."

This act was explained and amended by a subsequent statute the 21 Geo. III. c. 68. which, after reciting that the former act did not prohibit and make punishable the stealing of copper, brass, and bell-metal affixed to dwelling-houses, and the appurtenances thereto, enacts, “that all and every person and persons who shall steal, rip, cut, break or remove, with intent to steal, any *copper, brass, \*bell-metal, utensil, or fixture*, being fixed to any dwelling-house, out-house, coach-house, stable, or other building, used or occupied with such dwelling-house, or thereunto belonging, or to any other building whatsoever; or fixed in any garden, orchard, court-yard, fence, or outlet, belonging to any dwelling-house, or other building; or any *iron rails or fencing* set up or fixed in any square, court, or other place. (such person having no title, or claim of title thereto) shall be deemed and construed to be guilty of felony;” and the court may transport such felons for the term of seven years; or may order such offender to be kept in prison, and therein kept to hard labour for any time not exceeding three years, nor less than one year: and within that time, if such court shall think fit, such offender shall be once or oftener, but not more than three times, publicly whipped. And it further enacts, that “all and every person and persons who shall be aiding, abeting, or assisting, in stealing, or in such ripping, cutting, breaking, or removing any copper, brass, bell-metal, utensil, or fixture, fixed to any dwelling-house, out-house, coach-house, stable, or other building; or fixed in any garden, orchard, court-yard, fence or outlet belonging to any dwelling-house, or other building; or any iron rails, or fencing, set up or fixed in any square, court, or other place; or who shall buy or receive any such copper, brass, bell-metal, utensil, or fixture, iron rails, or fencing, knowing the same to be stolen, shall be subject and liable to all and every the same punishments, pains and penalties, as if he, she, or they, had stolen the same, although the principal felon or felons has not or have not been convicted of stealing the same.”

21 Geo. III. c. 68. Stealing or removing with intent to steal any copper, brass, or [\*1100] bell-metal, fixed to houses, &c. also made felony.

And the offenders may be transported, or imprisoned and whipped.

And persons aiding, &c. or buying, or receiving such copper, brass, &c. knowing them to be stolen, are made liable to the same punishments.

It has been already shewn that a *church* is within the meaning of the words “*or other building*,” in the statute, 4 Geo. II. c. 32. (*q*) But where the prisoner was indicted for stealing a “window casement made of iron, lead, and glass,” the property of the benchers of the Middle \*Temple, fixed to a certain building situate in Elm-court, it was holden that the case was not within the acts. The court said, that the statutes amongst the several articles which they enumerate do not mention “*a casement* :” that the statute 21 Geo. III. c. 68. being made to remedy the defects of the 4 Geo. II. c. 32. which mentions every specific article by name, the

Construction of these statutes.

[\*1101]

*q* *Ante*, 963.



words “any copper, brass, bell-metal, utensil, or fixture,” are to be taken as substantive nouns, and not as descriptions of the sorts of fixtures which the legislature intended to protect. (r)

Richards  
and Lave's  
case.  
Taking  
lead  
images,  
near a  
building,  
holden not  
to be with-  
in the sta-  
tute.

[\*1102]

In a case upon the statute 4 Geo. II. c. 32. the prisoners were charged in the first count of the indictment with stealing five hundred pounds weight of lead, the property of the Earl of Clarendon, “fixed in a certain outlet, belonging to his dwelling-house:” the second count stated, that the lead was fixed in “an outlet belonging to a certain building, called The Temple of Pan;” the third count, that it was fixed in “an outlet belonging to a certain building;” and in three other counts it was stated, that the lead was fixed “in a certain garden,” &c. instead of an “outlet.” Upon the evidence it appeared that the lead stolen consisted of three images, which at the time they were taken by the prisoners were standing on three pedestals to which they were attached with irons, and which pedestals were fixed in the ground, near a brick building called The Temple of Pan, which stood in an inclosed field belonging to the Earl of Clarendon, about half a mile from his dwelling-house, and on the outside of the pales of the park, from which it was separated by a public road. The building was only used occasionally by the family of the Earl of Clarendon, as a tea-drinking place; and when it was not in use, the doors and windows of it were kept shut. The doors opened into the place where the images stood. The only other building within the inclosure was an open building, once a barn, but at that time used only as a coach-house, when the family of the Earl of Clarendon came to the Temple of Pan. The taking of the lead was clearly proved against the prisoners, and the jury found them guilty: but the case was reserved for the consideration of the twelve Judges, who were of opinion, that it did not come within the statute. (s)

All build-  
ings seem  
to be with-  
in the 4  
Geo. II.  
c. 32.

But if the lead had been taken from the building in the foregoing case, the result would probably have been different; as it seems that all buildings are within the statute 4 Geo. II. c. 32. In a case where the prisoner was charged in the first count of the indictment with stealing lead, fixed to a certain building called a temple, used and occupied with a dwelling-house, and in the second count, with stealing lead fixed to a certain building, without further description; and it appeared, upon the evidence, that the prisoner stole the

r Senior's case, O. B. 1788. 1 Leach 496. 2 East. P. C. c. 16. s. 31. p. 593. The prisoner was afterwards indicted for a similar offence, before Wilson, J. and acquitted upon the authority of this determination. In a former case, Rex v. Hedge, 1 Leach 201. 2 East. P. C. c. 16. s. 30. p. 590. note (b), the question appears to have turned upon whe-

ther the window sashes stolen were fixed to the freehold; which was ruled in the negative, upon the facts of the case, which showed that they were only attached by a temporary fastening.

s Richards and Lave (case of), cor. B. Serjt. Hertford Lent Ass. 1802, MS.

lead from a building called a temple standing in a gentleman's park, about half a mile from the house, without any fence between, and used only occasionally as a summer-house, for taking tea and other refreshment; a doubt was entertained whether the building must not be ejusdem generis with those mentioned in the statute in order to bring a case within it: but the prisoner having been convicted, the point was reserved for the consideration of the Judges, who held the conviction right on both counts. (*t*)

In a case where the prisoner was indicted on the statute 4 Geo. II. c. 32. for stealing two hundred weight of lead, fixed to a house and building, the facts were, that the house in question being to be let, the prisoner, giving a false description \*of his situation in life and his place of residence, obtained possession of it, under a treaty for a lease of it for one and twenty years, which was agreed to be executed; and, in a few days after he had so obtained possession of it, stripped it of the lead on the roof, and of the leaden pipes, &c. The jury said that they were of opinion that he had entered into the contract for the purpose of getting a fraudulent possession of the house; and found a verdict of guilty: and, upon the case being reserved for the opinion of the Judges, though no opinion was publicly delivered, the prisoner afterwards was sentenced to pay a fine of a shilling, and to be imprisoned for two years in the house of correction. (*u*)

Where a prisoner, who was indicted on the statute 4 Geo. II. c. 32. for stealing lead, was found guilty only to the value of ten-pence, judgment was passed upon him, as for *petit-larceny*, that he should be whipped. (*w*)

Several statutes have been passed for the better preservation of *timber trees, plants, shrubs*, and other articles, which are the produce of the land. They do not, however, make the taking away of these things amount, in all cases, to an offence of the degree of felony; but it may be useful to mention their respective provisions shortly in this place.

The statute 6 G. III. c. 36. enacts, that "all and every person and persons, who shall, in the *night-time*, lop, top, cut down, break, throw down, bark, burn, or otherwise spoil, or destroy, or carry away, any *oak, beech, ash, elm, fir, chesnut, or asp*, timber tree, or other tree or trees standing for timber, or likely to become timber, without the consent of the owner or owners thereof first had and obtained; \*or shall, in the *night-time*, pluck up, dig up, break, spoil, or destroy, or carry away, any *root, shrub, or plant*, roots, shrubs, or plants, of the value of *five shillings*, and which shall be growing, standing, or being in the garden-ground, nursery-ground, or other

Munday's case. Where the prisoner had obtained fraudulent possession of a house upon an agreement for a lease, and stripped it of the leaden pipes, &c. it was holden to be within the act 4 Geo. II. c. 32. [\*1193]

6 G. III. c. 36. Cutting down, spoiling, &c. timber trees, and roots, &c. of five shillings value, in the night, made felony. [\*1104]

*t* Norris's case, Mich. T. 1803. MS.

*u* Munday's case, O. B. 1799. 2 Leach 350.

*2* East P. C. c. 16. s. 31. p. 594.

*1* Anon. O. B. 1775, by the opinion of Ash-

hurst, J. and Nares, J. and the Recorder; which opinion was afterwards confirmed by De Grey, C. J. Burland, B. and Gould, J. 2 East. P. C. c. 16. s. 31. p. 594.

Punishable  
by trans-  
portation.

And per-  
sons aiding,  
&c. or buy-  
ing, or re-  
ceiving the  
same,  
knowing  
them to be  
stolen, are  
made sub-  
ject to the  
same pun-  
ishment.

6 G. III. c.  
48. s. 1.  
Cutting  
down,  
spoiling,  
&c. timber  
trees, made  
punishable  
by fines, for  
the first  
and second  
offences.

[\*1105]

And a third  
offence is  
made fe-  
lony pun-  
ishable by  
transpor-  
tation.

inclosed ground, of any person or persons whomsoever, shall be deemed and construed to be guilty of felony :” and shall be liable to the pains and penalties of felony ; and the court may transport such persons for the space of seven years. It also enacts, that “ all and every person and persons who shall be wilfully aiding, abetting, or assisting, in such cutting down, breaking, throwing down, barking, burning, or otherwise spoiling, or destroying, or carrying away, any such oak, beech, ash, elm, fir, chesnut, or asp, timber tree, or other tree or trees, standing for timber, or likely to become timber, as aforesaid ; or in such plucking up, digging up, cutting, breaking, spoiling, or destroying, or carrying away, such root, shrub, or plant, roots, shrubs, or plants, as aforesaid, of the value aforesaid ; or who shall buy or receive such root, shrub, or plant, roots, shrubs or plants, of the value aforesaid, knowing the same to be stolen, shall be subject and liable to the same punishment, as if he, she, or they, had stolen the same.”

The 6 G. III. c. 48. s. 1. enacts, that “ every person who shall wilfully cut or break down, bark, burn, pluck up, lop, top, crop, or otherwise deface, damage, spoil, or destroy, or carry away, any *timber tree*, or trees, or trees likely to become timber, or any part thereof, or the lops or tops thereof, without the consent of the owner or owners thereof first had and obtained, or in any of his majesty’s forests, or chases, without the consent of the surveyor or surveyors, or his or their deputy or deputies, or person or persons, entrusted with the care of the same,” shall, upon conviction before a justice of the peace, for the first offence forfeit and pay a sum not exceeding twenty pounds, together with the charges of the conviction, and upon non-payment be committed to gaol for any time not exceeding twelve nor less than six months, or until payment ; \*and for a second offence shall forfeit and pay a sum not exceeding thirty pounds, with the charges, and upon non-payment be committed for any time not exceeding eighteen nor less than twelve months, or until payment : “ and if any person so convicted shall be guilty of the like offence a third time, and shall be thereof convicted *in like manner*, such person shall be deemed guilty of felony ; and the court, by and before whom such person shall be tried, shall and hereby hath authority to transport such person or persons for the space of seven years.”

Upon the words, “ *in like manner*,” in the foregoing section, it has been observed that there seems to be a mistake, as they imply a summary conviction, as before directed, before a justice ; whereas it could not be intended that a justice should, in this manner, have power to transport a man : and it is also observed that the word, “ *court*,” which afterwards occurs, seems (according to other words of the act) to mean court of assize or sessions, and implies a legal trial by

jury. (x) It is elsewhere observed, that perhaps the words, in like manner," were intended only to mean, "*by the like evidence.*" (y)

The second section of the statute 6 G. III. c. 48. enacts, "that all oak, beech, chesnut, walnut, ash, elm, cedar, fir, asp, lime, sycamore, and birch trees, shall be deemed and taken to be timber trees within the true meaning and provision of this act.

6 G. III. c. 48. s. 2. enumerates the trees to be deemed timber within the act.

The third section enacts, "that all and every person who shall pluck up or cut, spoil or destroy, or take or carry away, any root, shrub, or plant, roots, shrubs, or plants, out of the fields, nurseries, gardens, or garden-grounds, or other cultivated lands, of any person or persons whomsoever, without the consent of the owner or owners thereof \*first had and obtained," and shall be convicted before a justice of the peace, shall, for the first offence, forfeit not exceeding forty shillings, together with the charges of the conviction; and for a second offence, forfeit not exceeding five pounds, with charges: "And if any person so before convicted, shall a third time commit the like offence, and shall be thereof convicted, such person so convicted shall, for such third offence, be deemed guilty of felony; and the court, before whom such person shall be tried, shall, and hereby hath authority, to transport such person for the space of seven years."

6 G. III. c. 48. s. 3.

Cutting, spoiling, or carrying

[\*1106]

away roots, shrubs, or plants, made punishable by fines, for the first and second offences.

A third offence to be felony, punishable by transportation.

The fourth section enacts, "that all and every person and persons who shall go into the woods, underwoods, or wood grounds, of any of his majesty's subjects, not being the lawful owner or owners thereof, and shall there cut, lop, top, or spoil, split down, or damage, or otherwise destroy, any kind of wood, or underwood, poles, sticks of wood, green stubs, or young trees, or carry or convey away the same; or shall have in his, her, or their custody, any kind of wood, underwood, poles, sticks of wood, green stubs, or young trees; and shall not give a satisfactory account how he, she, or they, came by the same," and shall be convicted before a justice, shall, for the first offence, forfeit not exceeding forty shillings, together with the charges of the conviction; and for a second offence shall forfeit not exceeding five pounds, with charges; "and if any person or persons shall commit any of the offences aforesaid a third time, that then such person and persons, being duly convicted thereof, according to law, shall be deemed and adjudged an incorrigible rogue or rogues, and shall be punished as such."

6 G. III. c. 84. s. 4.

Cutting, &c. or carrying away wood, or underwood, punishable by fines for the first and second offences.

Any person offending a third time to be deemed an incorrigible rogue.

The sixth section provides, that unless the respective forfeitures be paid down upon conviction, the justice, where not otherwise directed by the act, may commit the offender to the house of correction, for the first offence, for one month to hard labour, and to be once whipped; and for the

6 G. III. c. 48. s. 6. If the forfeitures are not paid, the offend-

1 5 Burn. Just. Wood. 783, note (a).

y 2 East. P. C. c. 16. s. 29. p. 590, note (a).

ers may be imprisoned and whipped.

\*second offence, for three months to hard labour, and to be whipped once in each of the three months.

The statute further imposes a penalty on persons hindering the apprehension of offenders, makes provision as to the application of the forfeitures, (giving one moiety to the informer, and the other to the party grieved;) and gives a form of conviction. (z)

Construc-  
of these  
Statutes.  
Howe's  
case.

In a case where the prisoner was convicted on the statute, 6 G. III. c. 36. for spoiling and destroying, in the night time, five shrubs, called sweet bay trees, of the value of five shillings, an objection was taken that the statute was virtually repealed by the 6 G. III. c. 48. which was passed in the same session of parliament. But the point being submitted to the consideration of the Judges, all who were present (eleven) held, that as the statutes were passed in the same session, they should be considered as one act; it being mere accident in what order the chapters in the statute book were arranged, depending on the will of the clerks of the parliament. That, taking the statutes together, their provisions would be, that if the property taken, or destroyed, were of the value of five shillings, and the offence were committed in the night-time, the offender may be prosecuted for the felony, under the 6 G. III. c. 36; but that in other cases the offence must be prosecuted under the 6 G. III. c. 48. And they also held that the court were not obliged to transport the offender under the first act, but might pass any other sentence that could be passed for a single felony. (a)

[\*1108]  
Kemp's  
case.  
Meaning of  
the word  
"night"  
in the 6  
Geo. III. c.  
36.

\*With respect to the meaning of the word "night" in the statute 6 Geo. III. c. 36. it has been holden, that the same rule, relative to day and night, must be observed in prosecutions founded upon it, as prevails in cases of burglary. So that where, upon an indictment for stealing carnation plants, the witness stated that, while there was yet sufficient twilight remaining to enable him to discover the features of the face, he observed the prisoner get over the fence and take the plants out of the ground, the court directed the jury to acquit the prisoner. (b)

9 Geo. III.  
c. 41. s. 8.

The statute 9 Geo. III. c. 41. s. 8. reciting the fourth section of the 6 Geo. III. c. 48. (c) and the great destruction

z S. 7, 8, 9.

a Howe's case, cor. Eyre, C. B. and Wilson, J. O. B. 1788. 1 Leach 481. cited as Hitchcock and Howe's case, in 2 East. P. C. c. 16. s. 27. p. 588. where it is said that Buller J. was of opinion that if these two statutes had been made in different sessions, the last would, undoubtedly, have been a virtual repeal of the former. And it has been questioned whether a different construction would not be applicable to acts passed since 33 G.

III. c. 33. which provides that the day of receiving the royal assent shall be indorsed on the act, and be deemed the day of its commencement. 8 Ev. Col. Stat. Pt. vi. Cl. XL No. 10. p. 1055.

b Kemp's case, cor. Ashhurst, J. O. B. 1780, 1 Leach 222.

c Ante, 1106. It is a wrong recital of the act of 6 Geo. III. c. 48. but the 10 Geo. III. c. 30, was passed to remedy the mistake.

which had been then lately made of *hollies, thorns, and quicksets*, enacts, “that the said clause in the 6 Geo. III. c. 48. and all and every the penalties, forfeitures, and punishments thereby inflicted, and all other provisions, clauses, matters, and things relating thereto, shall extend, and be deemed, taken, and construed to extend, and shall be applied and put in execution, in relation to all his majesty’s forests and chaces within this realm; and to all and every person or persons who shall, without legal right or authority, by night or day, cut down, destroy, take, carry, or convey away any *hollies, thorns, or quicksets*, growing or being upon any of his majesty’s said forests or chaces, or within the woods or wood-grounds of any of his majesty’s subjects; or who shall have in his, her, or their custody or possession, any such *hollies, thorns, or quicksets*, and shall not give a satisfactory account how he, she, or they came by the same, and shall be thereof convicted before any one or more of his majesty’s justices of the peace, in the manner prescribed and directed by \*the said act.” And it also gives power to such justices to administer oaths, and proceed for the conviction and punishment of offenders, as fully and effectually as if the several provisions in the said act had been particularly repeated, and applied to the offences in the present act specified.

extends the fourth section of 6 Geo. III. c. 48. to persons destroying or carrying away *hollies, thorns, or quicksets*, or having them in possession and not giving a satisfactory account of them.

[\*1109]

The 13 Geo. III. c. 33. reciting the first and second sections of the statute 6 Geo. III. c. 48. and the doubts which had arisen, whether any others trees than those which were declared to be so by that statute, should be deemed timber trees, enacts, “that the trees called *poplar, alder, larch, maple, and hornbeam*, shall also be deemed timber trees,” and the offences of damaging or carrying them away are subjected to the same penalties and punishments as are imposed in that statute upon offences of the like kind concerning trees therein deemed timber trees.

13 Geo. III. c. 33. extends the 6 Geo. III. c. 48. s. 1. and 2. to the trees called *poplar, alder, larch, maple, and hornbeam*.

The statute 45 Geo. III. c. 66. s. 1. recites the fourth section of the 6 Geo. III. c. 48. (d) and also the act 9 Geo. III. c. 41. s. 8. (e) and then reciting that great depredations had been committed in his Majesty’s woods and chases upon *bark*, enacts. “that the aforesaid clauses in the said recited acts, and all and every the penalties, forfeitures, and punishments thereby inflicted, and all other provisions, matters, and things relating thereto, shall extend, and shall be applied and put into execution, in relation to all woods and wood-grounds, belonging to his majesty in Great Britain, as well in right of his duchy of Lancaster, as otherwise, and whether such woods or wood-grounds shall be within any of his majesty’s forests or chases, or not; and also to all and every persons and person who shall, without legal right

45 Geo. III. c. 66. s. 1. extends the provisions of the 6 Geo. III. c. 48. s. 4. and the 9 Geo. III. c. 41. s. 8. to wood-grounds belonging to his majesty: and also extends the said provisions to





or apples gathered from the trees, then the taking of them is not a trespass only but a felony. (f)

The statute 13 Geo. III. c. 32. repeals a former statute 23 Geo. II. which related to the stealing of turnips, and enacts, that "if any person shall steal and take away, or maliciously pull up or destroy any turnips, potatoes, cabbages, parsnips, peas, or carrots, growing or being in any garden, lands, or grounds, open or inclosed," and shall be thereof convicted before any justice, such offender shall forfeit not exceeding ten shillings above the value of the goods stolen; and, in default of payment shall be committed to the house of correction for any time not exceeding a month.

13 Geo. III. c. 32. Stealing and destroying turnips, potatoes, &c.

The provisions of this statute are in some respects extended and amended by the 42 Geo. III. c. 67. which enacts that "if any person shall steal, take away, wilfully or maliciously pull up, injure, or destroy, any turnips, potatoes, cabbages, parsnips, beans, peas, or carrots, growing or being in any garden, orchard, lands, or grounds, open or inclosed," and shall be thereof convicted in the manner directed by the 13 Geo. III. c. 32. such person shall forfeit not exceeding twenty shillings above the value of the goods stolen, injured, &c. and in default of payment shall be committed to the house of correction for any time not exceeding two months, unless the penalty be sooner paid.

42 Geo. III. c. 67. Stealing, injuring, and destroying turnips, potatoes, &c.

The 31 Geo. II. c. 35. s. 5., also gives a summary proceeding by conviction, before a justice, against any person who shall steal and take away, or wilfully and maliciously pull up and destroy any madder roots, so that the prosecution be commenced within thirty days after the offence committed.

[\*1112] 31 Geo. II. c. 35. s. 5. Stealing and destroying madder-roots.

II. Larceny cannot, by the common law, be committed of written instruments, whether they relate to real estate, or concern mere choses in action. If they relate to real estate, the taking of them is considered as merely a trespass and no felony, upon a principle allied to those already mentioned, namely, that they concern the land, or (in technical language) avow of the realty, are considered as part of it by the law, and descend with it to the heir: (g) and when they concerned mere choses in action, as bonds, bills, and notes, they were considered at common law not to be goods whereof larceny could be committed, as being of no intrinsic value, and not importing any property in possession of the person from whom they were taken. (h)

Of Larceny of written instruments.

Upon an indictment for stealing a parchment writing, purporting to be a commission for ascertaining the boundaries of certain manors, pursuant to an order of the court of Chance-

Wentbeer's case. Parchment writings

1 Burn. Jost. Wood. Ant. 1095, 1096. G. c. 16. s. 34. p. 536.  
2 Inst. 107. 1 Hale 516. 1 Hawk. P. C. 1 Hawk. P. C. c. 33. s. 32. ♦ Black.  
33 c. 35. 4 Black. Com. 234. 3 Inst. P. Com. 234. 2 East. P. C. c. 16. s. 36. p. 597.  
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which concern the realty are not the subjects of larceny.

[\*1113]

ry, the goods of our sovereign lord the king; and also another parchment writing annexed thereto, purporting to be a return made to the said commission, the goods of persons unknown: it was found by a special verdict, that the prisoner was guilty of privately taking away these parchment writings, being of the value of one penny each, with intent to steal them. In the course of the argument, it was urged by the counsel for the crown, that the reason why felony cannot be committed of charters which concern the realty, is, that they cannot be valued: but that the reason \*would not apply in this case, because a value had been affixed by the jury; and that it was well known that for certain purposes old parchments will sell for a considerable price: and it was also urged, that the relation to the realty does not alone constitute the exemption, as there could be no doubt that it would be felony to steal an heirloom, though that savours of the realty. The court, however, were unanimously of opinion, that as the parchment writings in question concerned the realty, no larceny could be committed of them. (i)

Nor the box, &c. in which they are kept.

The doctrine of charters and other written assurances concerning the realty not being the subjects of larceny has been carried so far, that it has been holden that no larceny can be committed of the box or chest in which they are kept. (k)

Records. 8 Hen. VI. c. 12. s. 3.

With respect to the stealing of records, the statute 8 Hen. VI. c. 12. s. 3. enacts, "that if any record or parcel thereof, writ, return, panel, process, or warrant of attorney, in the King's Court of Chancery, Exchequer, the one Bench or the other, or in his Treasury, be wilfully stolen, taken away, withdrawn, or avoided by any clerk, or other person, by reason whereof any judgment shall be reversed: that such stealer, taker away, withdrawer, or avoider, their procurers, counsellors, and abettors, being thereof indicted, \*and by process thereupon made thereof duly convicted, by their own confession, or by inquest to be taken of lawful men, whereof the one half shall be of the men of any court of the same courts, and the other half of other, shall be adjudged for felons, and shall incur the pain of felony. And that the Judges of the said courts, of the one bench or of the other, have power to hear and determine such defaults before them, and thereof to make punishments as afore is said."

[\*1114]

Some points upon the construction of this statute will be noticed in a subsequent chapter. (l)

i Westbeer's case, O. B. 1739. 1 Leach 12. 2 East. P. C. c. 16. s. 34. p. 596. The special verdict and the indictment were removed into the court of King's Bench by certiorari in Trin. T. 1740. A question appears to have been raised, after the court had decided upon the point stated in the text, whether the prisoner should be discharged or receive judgment on this indictment as for a trespass: but it was determined without much difficulty

that no such judgment could be given. 1 Leach 14, 15.

k Staundf. 25 b. 1 Hale 510. And the same law is laid down in 3 Inst. 109. as to the box or chest, though it be of great value; and the reason given is, that "it shall be of the same nature the charters be of; *et omne majus dignum trahit ad se minus.*"

l See post, the Chapter on the Avoiding, &c. of Records.

It has been observed that written instruments which contained mere *choses in action*, as being of no intrinsic value, and not importing any property in possession of the party from whom they were taken, were not at common law the subjects of larceny; (*m*) which offence can be committed only in respect of goods which have some worth in themselves, and do not derive their worth merely from their relation to some other thing. (*n*) But the legislature has thought it necessary to interfere upon this subject; and the stealing of *choses in action* is now in many instances made felony by statute.

*Choses in action.*

The 2 Geo. II. c. 25. s. 3. (which was passed in the first instance for five years, but revived and made perpetual by 9 Geo. II. c. 18.) enacts "that if any person or persons shall steal or take by robbery, any exchequer orders or tallies, or other orders, entitling any other person or person to any annuity or share in the parliamentary fund, or any exchequer bills, South Sea bonds, bank-notes, East India bonds, dividend warrants of the bank, \*South Sea company, East India company, or any other company, society or corporation, bills of exchange, navy bills or debentures, goldsmiths' notes for payment of money; or other bonds or warrants, bills, or promissory notes for the payment of any money, and the property of any other person or persons, or of any corporation, notwithstanding any of the said particulars, are deemed in law a *chose in action*, it shall be deemed and construed to be felony of the same nature and in the same degree, and with or without the benefit of clergy, in the same manner as it would have been, if the offender had stolen or taken by robbery, any other goods of like value with the money due on such orders, tallies, bills, bonds, warrants, debentures, or notes, or secured thereby, and remaining unsatisfied: and such offender shall suffer such punishment as he or she should or might have done, if he or she had stolen or taken other goods of the like value with the monies due on such orders, tallies, bonds, bills, warrants, debentures or notes respectively, or secured thereby, and remaining unsatisfied."

2 Geo. II. c. 25. s. 3. Stealing of exchequer orders or bills, South Sea bonds, bank-notes, East India bonds, dividend warrants, bills of exchange, promissory notes, &c. made felony, as if goods of the like value were taken.

The stealing a single bank-note has been holden to be within the statute; though the words in the statute are "bank-notes," in the plural number. (*o*) And where the prisoner was convicted of stealing a note, by which the maker promised to pay to the prosecutor or order a sum of money, but which the prosecutor had not indorsed; it was holden by all the judges that its not being indorsed was immaterial. (*p*) In a case where the prisoners were indicted

Points upon the construction of this statute.

*Ante*, 1112.

1 Hawk. P. C. c. 33. s. 35. 2 East. P.

c. 16. s. 96 p. 597.

*o* Hassell's case, O. B. 1750. 1 Leach J.

2 East. P. C. c. 16. s. 37 p. 598.

*p* Anon. East. T. 1781. 2 East. P. C. c.

16. s. 37, p. 598.

for stealing a bill of exchange, it appeared that when the bill was stolen from the prosecutor, at Manchester, two names only were indorsed upon it; but that when it was negotiated by one of the prisoners, at Leicester, a third name was added to the two other indorsers: upon which it was [\*1116] \*objected, on behalf of the prisoners, that this being an indictment, in Leicester, for *then and there* stealing a bill of exchange, whereon were indorsed the names of the two first indorsers, it was not supported by the evidence of a bill with an additional name indorsed thereon, at the time the bill was negotiated by one of the prisoners, in Leicester. But the prisoners were convicted: and the point being submitted to the twelve Judges, for their consideration, they all agreed that the addition of the third name made no difference; that it was the same bill that was originally stolen; and, therefore, that the conviction was proper. (q)

Exchequer bills not signed by the proper person.

With respect to the meaning of the words, “exchequer bills,” in the statute, it may be observed, that where upon another statute relating to embezzlements by servants of the Bank of England, which will be mentioned in a subsequent chapter, (r) a prisoner was indicted for stealing certain bills, commonly called exchequer bills; and it appeared that the person, who signed them, on the part of the government, was not legally authorized so to do; the court held that they were not good exchequer bills; and the prisoner was consequently acquitted. (s)

Clarke's case. The paper and stamps of the notes of country bankers, which have been paid by their correspondent bankers, in London, [\*1117] and are re-issuable by the country bankers, are the valuable property of the country bankers, while in transitu, for the pur-

In a late case it was holden that the *paper and stamps of the notes of a firm of country bankers*, which had been paid by their correspondent banker, in London, and which were re-issuable by the country bankers, were the *valuable property* of such country bankers while they were in transitu for the purpose of being re-issued. The indictment consisted of several counts; in some of which the prisoner was charged with stealing “promissory notes;” and in others he was charged with stealing “one hundred and thirty-five *pieces of paper*, each being respectively stamped with a stamp of four shillings, value four shillings, being the \*stamp directed by the statute in such case made and provided on every promissory note for payment to the bearer on demand of any sum of money not exceeding, &c.; one hundred and eighty-four *pieces of paper*, each being respectively stamped with a stamp of one shilling, &c.; and seventy-seven *pieces of paper*, each being respectively stamped with a stamp of one shilling and six-pence, &c. all the said pieces of paper being so stamped as aforesaid, and being the property, &c.; and each and every of the said stamps being then available, and of

q Austin and King, *Leicester Lent. Ass.* 1783. East. T. 1783. 2 East. P. C. c. 16. s. 37. p. 602.

r *Post.* Chap. XVI.

s Aslett's (first) case. 2 Leach 951.



full force and effect, against the peace, &c." It appeared, to evidence, that the paid notes in question were made up into a parcel by the London bankers, and sent by the mail to the country bankers, who never received them, and were under the necessity of issuing other notes on fresh stamps in their stead. It was also proved that many of the paid notes, so missed, were traced to the possession of the prisoner, at the bar, under very strong circumstances of suspicion.

pose of being re-issued.

The prisoner's counsel objected that the charge being for a larceny, the law required that the property stolen should be of some value; that the notes, in the present instance, having been paid, they were become, both with respect to the money they were intended to secure, as well as to the stamps, mere waste paper; that their former value was extinct: and that before they could again become valuable property, it was necessary they should have been actually re-issued by the firm of the country bank. And it was also objected, as to the counts for stealing the stamped pieces of paper, that they could not be sustained; inasmuch as the stamps, having been used, were not at the time when they were taken in any way saleable as stamps; that their operation, as stamps, was, at that time, completely finished, and at an end; and that they would not reassume the character of stamps, until the notes, to which they were affixed, had undergone the process of being re-issued.

The case was left to the jury, who found the prisoner guilty; upon which the judgment was respited, and the case referred to the consideration of the twelve Judges, whose opinion was afterwards delivered by Grose, J. to the following effect:—"The question submitted in this case to the consideration of the Judges was, whether the paper and the stamps are, under the circumstances of the case, the subjects of larceny at common law; or, in other terms, whether they are the property of, and of any value to Messrs. Large and Co. the country bankers) who were unquestionably the owners of them. These gentlemen had paid for the paper, the printing and the stamps of these papers, which once existed, both in character and in value, as promissory notes. Their character and value, as promissory notes, were certainly extinct at the time they were stolen; but, even in this state, they bore about them a capability of being legally restored to their former character and pristine value. It was a capability in which these owners had a special interest and property. The act of re-issuing them would have immediately manifested their value as papers, for it would have saved their owners the expence of reprinting other notes, and of purchasing other stamps, to which expence, it was proved, they were put, on their being deprived of these papers, by the crime of the prisoner. In what sense or meaning, therefore, can it be said that these stamped papers

[\*1118]



were not the valuable property of their owners? *They were, indeed, only of value to those owners; but it is enough that they were of value to them: their value as to the rest of the world is immaterial.* The Judges, therefore, are of opinion, that, to the extent of the price of the paper, the printing, and the stamps, they were valuable property belonging to the prosecutors; and that the prisoner has been legally convicted." (t)

[\*1119]

Ranson's case. Notes of a country bank paid in London, and not re-issued, held to retain the character and fall within the description of promissory notes.

\*In a case where the prisoner was indicted upon a statute (7 Geo. III. c. 50. s. 1.) relating to larcenies and embezzlements, by persons employed in the Post-office, (u) and the indictment charged him with secreting a letter, containing certain "*promissory notes*;" it was objected, on his behalf, that the notes contained in the letter could not be considered as promissory notes, the money having been paid to the holders of them, while they possessed the character of promissory notes, by the bankers in London; and that as they had not been re-issued in pursuance of the statutes, they had not been revived, as those statutes direct, and therefore were not good and valid promissory notes. But the case being reserved for the consideration of the twelve Judges, a majority of them were of opinion, that these notes, though not re-issued, still retained the character, and fell within the description of *promissory notes*; that they were, as promissory notes, valuable to the owners of them; and therefore that the verdict given against the prisoner in this case was right in law. (w) But a case is mentioned in which it is said to have been ruled, that it was not felony under this statute of 2 Geo. II. c. 25. to steal banker's notes completely executed, but which had never been put into circulation; on the ground that no money was due upon them. (x)

Phipoe's case.

Where a party was compelled by great violence to sign a promissory note which [\*1120] had been previously prepared

But where a party was compelled, by great violence and menace of death, to sign a promissory note on stamped paper previously prepared by the prisoner, and the prisoner was present during the time, and withdrew the note as soon as it was made, it was holden not to be a case within the statute 2 Geo. II. c. 25. The indictment charged the prisoner with robbing the prosecutor in a dwelling-house, and taking from him a promissory note of the value of 2,000*l.* signed \*by the prosecutor, against the form of the statute: and another count laid the note as the property of the prosecutor. The facts proved were, that the prisoner inveigled the

t Clarke's case, O. B. 1810. 2 Leach 1036. And in a MS. note of the judgment in this case, with which the author has been favoured, the principle is thus stated, "If a chattel be valuable to the possessor, though not saleable, and of no value to any one besides, it may still be the subject of a larceny."

u See the statute, and this case more fully, *post*, Chap. XVII.

w Ranson's case, O. B. 1812, 2 Leach 1090, 1093.

x Anon. *cor.* Lord Ellenborough, C. J. *Carlisle*, 1802, mentioned in the notes to 4 Black. Com. 234. and in note (b), in 2 Leach 1061. But *qu.* and see Clarke's case, *ante*, 1116, 1118.

prosecutor to her house, where he was detained by force for several hours, and at length induced, by great violence and menace of death, to sign the promissory note in question. It was dated March 30, 1795, and promised in the usual form two months after date to pay the prisoner, or order, two thousand pounds. And it appeared that the prisoner attempted to get the note discounted the next day, without success; and it was found in her possession when she was apprehended.

The jury having found the prisoner guilty, the case was reserved for the consideration of the twelve Judges; the principal objection to the conviction, as urged by the counsel for the prisoner, being, that the case was not within the statute 2 Geo. II. c. 25. the note being of no value while in the hands of the prosecutor, and the statute only extending to secure valid existing securities in the possession of the party robbed. It was argued, that nothing could be said to be due on this note as the statute required; and that it never was the property, nor in the possession, of the prosecutor, the paper and stamp being the property of the prisoner, and never out of her possession: that the prisoner had in fact acquired the note not by stealing, but by duress.

It appears that there was considerable difference of opinion amongst the Judges upon this point. It is said, that nine of them expressly held, that the offence was not within the statute: some of them thinking that the statute was only intended to protect existing available notes in the hands of the person from whom they were taken, and that this note did not come within that description, being of no value in the hands of the prosecutor; and others inclining to think that the note was of value from the moment it was drawn; but that it never was in the possession of the prosecutor, but \*continued all the time in the possession of the prisoner herself, by whose duress the prosecutor was compelled to make it. And Eyre, C. J. observed, that the property never existed till the force, but, arose out of it; and that therefore it was different from the case of money. And admitting that if the prosecutor had brought the note in his pocket, it would have been a case within the act, though the note would not be available while in his possession (upon which point he should have hesitated;) yet this was not that case. But all the nine Judges considered that the whole transaction was one continued act, and that the note was procured by duress, and not by stealing. One of the Judges (Ashhurst J.) who differed, thought that it was not a single act; but that there was a distinguishable interval between the writing of the note and the actual taking of it by the prisoner, during which the prosecutor had the possession of it; and that therefore it was taking from him an instrument of value within the meaning

by the prisoner, who produced it and withdrew it again as soon as it was signed, the case was holden not to be within the statute 2 Geo. II. c. 25.

[\*1121]

of the statute, as it would have been available against him in the hands of an innocent holder. On this ground also, Macdonald, C. B. doubted. The other Judge (Buller, J.) was absent.

The opinion of the majority of the Judges was afterwards delivered by Ashhurst, J. He stated, "that as the legislature at the time of passing the statute 2 Geo. II. c. 25. s. 3. whereby the stealing a chose in action was made felony, could not possibly have a case like the present in contemplation, it was not within that act of parliament; that it was essential to larceny, that the property charged to have been stolen should be of some value; that the note in the present case did not, on the face of it, import either a general or a special property in the prosecutor; and that it was so far from being of any the least value to him, that he had not even the property of the paper on which it was written: for it appeared that both the paper and the ink were the property of the prisoner; and the delivery of it by her to him could not, under the circumstances \*of the case, be considered as vesting it in him." (y)

Walsh's case. Argued that a check upon a banker is not within the 2 Geo. II. c. 25.

This authority was cited in a case of recent occurrence, where the prisoner was charged with stealing a *check* upon a banker, which, in some of the counts of the indictment, was described as "a bill of exchange," and in others as "a warrant for the payment of money." It was argued, on behalf of the prisoner, that these counts were bad on the ground that the statute 2 Geo. II. c. 25. extends only to such instruments as are available securities in the hands of the party from whom they are stolen; that a check on a banker does not create any debt between the drawer and the banker, whose liability to the drawer remains precisely the same as before, and is not altered in any respect by such an instrument; and that, consequently, the check in the present case, not being a security to the prosecutor, could not be averred, as in this indictment, to be either "a bill of exchange," or, "a warrant for the payment of money," the property of the prosecutor, and upon which the sum of money, for the payment whereof it was made, was due thereon to him. It was not, however, necessary to press this objection, as the case supplied one of greater importance, which has been already noticed. (z)

As to larceny of *lottery tickets* see the statute 57 Geo. III. c. 31. s. 58.

Of Larceny of animals, birds, and fish.

III. The third subject of enquiry, under the head of personal goods in respect of which larceny may be committed,

y Phipoe's (Maria Theresa) case, O. B. 1795, and Serjeant's Inn, Feb. 1796, 2 Leach 673. 2 East. P. C. c. 16. s. 37. p. 599.

z Walsh's case, 2 Leach 1061. *Ante*, 1061.

arises when the property taken consists either of *animals, birds, or fish.*

With regard to domestic animals, such as horses, oxen, Domestic  
\*sheep, and the like, there is no doubt whatever that they animals.  
were the subjects of larceny at common law. (a) And the [\*1123]  
stealing of many of these animals has been made a capital  
offence, by the provisions of several statutes, which will be  
noticed in a subsequent chapter. (b) Domestic birds also, as  
ducks, hens, geese, turkeys, peacocks, &c. are clearly the sub-  
jects of larceny. (c) So also larceny may be committed of  
their eggs or young ones. (d)

And as the stealing of such animals is larceny, it is also And their  
larceny to steal the produce of them, though taken from the produce.  
living animals. Upon this ground it was holden by all the  
Judges, on a case reserved for their opinion, that milking a  
cow at pasture, and stealing the milk, was larceny. (e) And  
it has also been holden that larceny may be committed by  
pulling wool from the bodies of live sheep and lambs with a  
felonious intent. (f) In one report of this last decision it is  
given as a part of the opinion of the Judges, to whose con-  
sideration the question was referred, that in order “to pre-  
vent the thoughtless and wanton frolics which might be play-  
ed with these trifling kinds of property from being prosecut-  
ed as petty larcenies, when perhaps they were unmixed with  
any fraudulent or felonious design, the law, proceeding upon  
the idea *de minimis*, requires the property stolen to be of the  
value of twelve-pence.” (g) First, observing that the pro-  
perty taken must, in all cases of simple larceny, be *above* the  
value of twelve-pence, in order to make the offence more than  
petit larceny; it is submitted with great deference that the  
doctrine that petit larceny may not be committed by thus  
taking wool from the backs \*of sheep, when the value of the [\*1124]  
wool is not more than twelve-pence, seems to be very ques-  
tionable. Undoubtedly the quantity taken, if considerable,  
will be a strong additional circumstance in the evidence of  
felonious intent necessary to sustain a charge of larceny: but  
supposing that quantity not to be of greater value than  
twelve-pence; yet if the felonious intent of the party be mani-  
fest, as it may be from the manner in which the fact is com-  
mitted, the use to which the property is applied, and the be-  
haviour of the party, why should such a taking not be con-  
sidered as petit larceny? (h)

a 1 Hale 511. 1 Hawk. P. C. c. 33. s. 43.

b Post. Chap. IX.

c 1 Hale 511. 1 Hawk. P. C. c. 33. s. 43.

d *Id. ibid.* Hale's Sum. 68, 69.

e Anon. cor. Leigh, Serjt. who sat for Ba-  
turst, J. Oxford circuit about 1769. 2 East.  
P. C. c. 16. s. 49. p. 617. 1 Leach 171.

f Martin's case, Northampton Lent Ass.  
1777, 1 Leach 171. 2 East. P. C. c. 16. s. 49.  
p. 618.

g 1 Leach 172.

h It should be observed also, that in the  
abstract of Martin's case, in 2 East. P. C. c.  
16. s. 49. p. 618. it is not stated as any part  
of the opinion of the Judges that the property  
stolen should be above the value of twelve-  
pence. And at the conclusion of the report  
in which that position is advanced, the doc-  
trine appears to be contradicted, where it is  
said, “if a wicked disposition be discovered,

Animals,  
*&c.*, *feræ naturæ* re-  
 claimed or  
 dead.

Where the animals or other creatures are not domestic, but are *feræ naturæ*, larceny may, notwithstanding, be committed of them, if they are fit for the food of man, and dead, reclaimed, (and known to be so) or confined. Thus, if hares or deer be so inclosed in a park, that they may be taken at pleasure; or fish in a trunk or net, or as it seems in any other inclosed place which is private property, and where they may be taken at any time, at the pleasure of the owner; or pheasants and partridges be confined in a mew; or pigeons be shut up in a pigeon-house; or swans be marked and pinioned, or (though unmarked) be kept tame in a mote, pond, or private river; or if any of these creatures be dead and in the possession of any one; the taking of them with felonious intent will be larceny. (i) And of some things *feræ naturæ*, though not fit for food, felony may be committed, if they be reclaimed; in respect of their generous nature and courage, serving as *vitæ solatium* of princes and noble persons, to make them fitter for great employment; so that larceny may be committed of hawks and falcons, when reclaimed and known to be so; (k) and it may be committed also, it is said, of young hawks, in the nest. (l) But not of the eggs of hawks or swans, though reclaimed; the reason of which seems to be that a less punishment namely, fine and imprisonment, is appointed for taking them by statute. (m) The stealing a stock of bees seems to be admitted to be felony. (n)

Animals,  
*&c.*, unre-  
 claimed.

But a different doctrine prevails with respect to animals and other creatures *feræ naturæ* which are unreclaimed; as it is considered that no person has a sufficient property in them to support an indictment for larceny. Thus larceny cannot be committed of deers, hares, or conies, in a forest, chase or warren; of fish, in an open river or pond; of wild fowls, when at their natural liberty; of old pigeons, out of the dove-house; (o) or even of swans, though marked, if they range out of the royalty, because it cannot be known that they belong to any person. (p) But larceny may be committed of the flesh or skins of any of these or other creatures fit for food, when they are killed; because they are then reduced to a state in which a right of property in them may be claimed and exercised. (q)

the disposition a *faire un mal chase*, as it is described by Britton, it may be evidence of felony, notwithstanding the trifling quantity of the thing taken."

i 3 Inst. 109, 110. 1 Hale 511. 2 Hawk. P. C. c. 33. s. 41. 4 Black. Com. 235. 2 East. P. C. c. 16. s. 41. p. 607.

k 37 Ed. III. c. 19. 1 Hawk. P. C. c. 33. s. 38. And see 3 Inst. 96 *et seq.* as to the sort of hawks and falcons within this statute: and 3 Inst. 109.

l 1 Hale 511. This law had relation to the *trained hawks* of former days.

m 11 Hen. VII. c. 17. and 31 Hen. VIII. c.

12. 1 Hawk. P. C. c. 33. s. 42. 2 East. P. C. c. 16. s. 41. p. 607.

n 2 East. P. C. c. 16. s. 41. p. 607. citing *Tibbs v. Smith*, Ray. 33. 2 Black. Com. 397.

o 3 Inst. 109, 110. 1 Hale 510, 511. 1 Hawk. P. C. c. 33. s. 39, 40. 4 Black. Com. 235. 2 East. P. C. c. 16. s. 41. p. 607.

p 1 Hale 511.

q 3 Inst. 110. 1 Hale 511. In 3 Inst. 110, it is said, "But the deer, &c. being taken when he is killed, larceny may be committed of the flesh, and so of pheasants the like; and so also a diverse beasts as be *feræ naturæ*."

\*It is so clearly established, that those creatures which are *feræ naturæ* can only become the subject of property by being dead, reclaimed, or confined, that it has been holden to be necessary that they should be so described in an indictment for stealing them. The prisoner, having been convicted on an indictment for stealing a pheasant of the value of forty shillings, of the goods and chattels of H. S., the case was referred to the consideration of the Judges; and upon a second conference, and after much debate and difference of opinion, they all agreed that the conviction was bad; that in cases of larceny of animals *feræ naturæ* the indictment must show that they were either dead, tame, or confined; otherwise they must be presumed to be in their original state: and that it is not sufficient to add "of the goods and chattels" of such an one. (r)

It has been ruled that though a person be not qualified to keep, or kill, game, he may have a sufficient legal possession of animals, &c. coming under that description, whereon to support an indictment for stealing them. The prisoner was indicted for stealing five pheasants, restrained of their natural liberty, the property of the prosecutor: and, upon its appearing from the evidence that the prosecutor was not a qualified person to keep or shoot game, and that he had the pheasants for sale, it was objected that he could have no property in them, nor any legal possession sufficient to support the indictment; that by the several statutes relating to the game laws, unqualified persons are forbidden, under certain penalties, to have pheasants in their possession: and that by one of those statutes authority is given to a justice of the peace to take away from such person any pheasant which he may have in his possession. But the learned Judge held that it was a sufficient legal possession for the purposes of the indictment; and the prisoner was convicted. (s)

The stealing of deer, of conies, and of fish, has been made punishable by the enactments of different statutes, which will be stated in some of the following chapters.

There is yet another kind of animals to be noticed; namely, those which, though they may be reclaimed, are such of which larceny can be committed by reason of the baseness of their nature. Some animals which, in the country, are now usually tame, come within this classification; as dogs and cats. And others, of a more savage nature, are often reclaimed by man, and are within the same rule: as bears.

Rough's case. An indictment for stealing an animal *feræ naturæ* must show that it was either dead, tame, or confined.

Jones's case. An unqualified person may have a sufficient legal possession of game to support an indictment for stealing it from him.

\*1127]

Deer, conies, and fish, are made punishable by the enactments of different statutes, which will be stated in some of the following chapters.

There is yet another kind of animals to be noticed; namely, those which, though they may be reclaimed, are such of which larceny can be committed by reason of the baseness of their nature.

Some, however, are reclaimed by man, and are within the same rule: as bears.

\* Rough's case. See 1 L. R. 100.



*cats, ferrets, and the like.* (t) The reason upon which this doctrine appears originally to have proceeded is, that creatures of this kind, for the most part wild in their nature, and not serving, when reclaimed, for food, but only for pleasure, ought not, however the owner may value them, to be so highly regarded by the law that for their sakes a man should die. (u) And the doctrine extends to the whelps, or young, of such animals: the rule being established, that where no felony can be committed of any creatures that are *feræ naturæ*, though tame or reclaimed, it cannot be committed of the young of such creatures in the nest, kennel, or den. (w)

Searing's case. Ferrets are animals of a base nature, and not the subject of [\*1128] larceny.

The doctrine respecting larceny of animals, of a base nature, was considered in a late case, where the prisoner was charged in the indictment with stealing "five live tame ferrets, confined in a certain hutch, &c." the property of Daniel Flower. The evidence brought the fact of taking the ferrets clearly home to the prisoner; and it was also \*proved that ferrets are valuable animals, and that those in question were sold by the prisoner for nine shillings. But, the jury having found the prisoner guilty, the case was submitted to the consideration of the Judges upon the question, whether ferrets must be considered as animals of so base a nature that no larceny can be committed of them. And the Judges held the conviction wrong. (x)

Dogs. 10 Geo. III. c. 18.

With respect, however, to dogs, as they are animals, many sorts of which are useful, and sometimes essentially serviceable to man, the legislature has made provision for the punishment of such as shall steal them, by a summary proceeding before two justices, by stat. 10 Geo. III. c. 18. That statute enacts, that if any person shall steal any dog of any kind or sort whatsoever, or shall sell, buy, receive, or detain, any such dog, knowing it to have been stolen, such person, upon being convicted before any two justices of the peace, shall, for the first offence, forfeit not exceeding thirty pounds, nor less than twenty pounds, together with the charges of conviction; and that, in case the penalty be not forthwith paid, the justices shall commit the offender for any time not exceeding twelve, nor less than six months, or until payment. And it further enacts, that if any person, having been so convicted, shall be guilty of the like offence, and be thereof convicted in like manner, such person shall, for every such offence, forfeit not exceeding fifty pounds, nor less than thirty, together with the charges (which said penalties, or any of them, when recovered, are to be paid one

t 3 Inst. 109. 1 Hale 511, 512.  
u 1 Hawk. P. C. c. 33. s. 36. 4 Black. Com. 236. 2 East. P. C. c. 16. s. 45. p. 614.  
w 3 Inst. 109.

x Searing's case, cor. Wood, B. Hertford Lent. Ass. 1818, MS. The ferret was originally a native of Africa, but has been for a long time bred, kept, and sold, in this country, as a tame animal.

moiety to the informer, and the other moiety to the poor of the parish, where the offence shall be committed); and that upon nonpayment such justices shall commit the offender for any time not exceeding eighteen, nor less than twelve months, or until payment: and then the act proceeds, “and such justices shall also order the said offender \*to be publicly [\*1129] whipped within three days after such commitment, in the town where such gaol, or house of correction, shall be, between the hours of twelve and one of the clock.”

The second section of the act empowers a justice to grant a warrant to search for a stolen dog; and makes the persons, in whose custody any such dog, or its skin, shall be found (being privy to the theft, or to the skin being that of a stolen dog), liable to the like punishments, as persons convicted of stealing a dog. A form of conviction is then given; (y) and provision is made for an appeal to the quarter-sessions. (z)

The clauses of this statute are in some instances, open to observation; but the better opinion seems to be that there is not much ground for one of the doubts suggested, (a) namely, whether the provisions of the statute would extend to stealing a *bitch*; the name, *dog*, being evidently intended to denote the species. (b)

### SECT. III.

#### OF THE OWNERSHIP OF THE GOODS IN RESPECT OF WHICH LARCENY MAY BE COMMITTED.

It is necessary that there should be in some person a sufficient ownership of the things stolen; and that they should be stated in the indictment as the goods and chattels of such person.

And this ownership must, of course, exist as against the party by whom the goods are taken; and will not, in general, \*reside sufficiently in any other person, where the party taking the goods has a legal property in them, and a right of possession. So that joint tenants, or tenants in common of a chattel, cannot be guilty of stealing such chattel from each other. Thus, if A. and B. be joint tenants, or tenants in common, of a horse, and A. take the horse, even *animo furandi*, yet it will not be felony, because one tenant in com-

Joint-tenants, or [\*1130] tenants in common have not an ownership, as against each other, upon

y S. 3.

z S. 4.

a 1 Burn. Just. *Dogs*.

b 7 Ev. Col. Stat. Part VI. Cl. XIII. No. 1. p. 180. note (1). 4 Black. Com. 236.

note (b). But the suggestion hardly seems to deserve to be characterized (as it is in the note to 4 Black. Com.) as a *very idle* doubt. See further as to the construction of this statute, 1 Burn. Just. *Dogs*.

which an indictment for larceny can be sustained.

Nor has a husband such an ownership of his goods as against his wife, that she or any one, by her delivery, may commit larceny of them.

A man, may, in certain cases, be guilty of larceny, in taking his own goods from a bailee.

[\*1131]

The ownership will not be divested from the true owner by an intermediate tortious taking.

mon taking the whole only does that which he may do by law. (c)

We have seen that a feme covert cannot commit larceny of her husband's goods by taking them from the possession of her husband, because in law they are considered as one person, and she has a kind of interest in the goods. (d) And upon the same ground it has been holden, that even a stranger cannot commit larceny of the husband's goods by the delivery of the wife, unless he be her adulterer. (e) But, if the husband bail the goods to a third person, as there will then be a possession in the bailee, distinct from that of the husband, it may be larceny if the wife take such goods with a felonious intent. (f)

The last case depends upon an exception to the general rule, that a person cannot commit felony of the goods wherein he has a property. (g) He may, under particular circumstances, be guilty of larceny in stealing his own goods, as he may of robbery in taking his own property from the person of another. If A. bail goods to B., and afterwards *animo furandi* take the goods from B., with an intent to charge him with the value of them, it is felony. (h) And so if A., having delivered money to his servant to carry to some distant place, disguise himself, and rob the servant on the road, with intent to charge the hundred with the loss, according to the statute of Winchester, it will be robbery in A. (i) For as against persons so taking even their own goods with a wicked and fraudulent intent, there is a sufficient temporary special property in the bailee or servant to support an indictment. (j)

The real owner of goods will not be deprived either of the property or possession in law of them by a felonious taking. If, therefore, A. steal the goods of B., and afterwards C. steal the same goods from A., in such case C. is a felon, both as to A. and as to B., and he may be indicted for stealing the goods of B. (k) Upon this subject Gould, J., in delivering the opinion of the twelve Judges in a modern case, said, "It is a rule of law equally well known and established that the possession of the true owner cannot be divested by a tortious taking; and therefore if a person unlawfully take my goods, and a second person take them again from him, I may, if the goods were feloniously taken, indict such second person for the theft, and allege in the indictment, that the goods are my

c 1 Hale 513. 2 East. P. C. c. 16. s. 7. p. 558.

d *Ante*, 26, 27.

e *Ante*, 27.

f 1 Hale 513.

g *Id. Ibid.*

h Staundf. 26 a. 3 Inst. 110. 1 Hale 513, 514. 1 Hawk. P. C. c. 33. s. 47.

i Fost. 123, 124. 4 Black Com. 231. 2 East. P. C. c. 16. s. 5. p. 558, and s. 90. p. 654: where the learned author says, that even in this case he sees no objection to laying the property of the goods in the servant.

j See also the argument in Deakins's case, 2 Leach 871.

k 1 Hale 507. 2 East. P. C. c. 16. s. 90 p. 654.

property: because these acts of theft do not change the possession of the true owner." And he further stated it to be his opinion that the doctrine would also hold where the goods are taken from the possession of the true owner by means of *fraud*: as otherwise a man might derive an advantage from his own wrong. (l)

But a distinction is taken in the following case. If A. steals the horse of B., and afterwards delivers it to C. who was no party to the first stealing, and C. rides away with it *animo furandi*, yet C. is no felon to B.: because, though the horse was stolen from B., yet it was stolen by A., and not by C., for C. did not take it; neither is he a felon to A., for he had it by his delivery. (m) [\*1132]

There is no doubt that there may be a sufficient ownership of the goods stolen in a person who has only a *special property* in them; and that they may be laid as the goods and chattels of such person in the indictment. A *lessee* for years, a *bailee*, a *pawnor*, a *carrier*, and the like, have such special property; and the indictment will be good if it lay the property of the goods, either in the real owners, or in the persons having only such special property in them. (n) So where goods belonging to a guest at an inn are stolen, they may be laid to be the property either of the innkeeper or the guest. (o) And linen stolen from a washerwoman, by whom it was taken in to wash in the course of her business, may be laid as her goods. (p) In cases of this kind it is considered that the parties have a *possessory property*; being answerable to their employers, and being capable of maintaining an appeal of robbery or larceny, and having restitution. (q)

Ownership sufficient where there is only a special property in the goods.

It has also been holden, that an agister of cattle has such a special property in them that they may be laid as his goods in the indictment. When this case was referred to the Judges, after the conviction of the prisoner, there was at first some doubt upon the point; one of the Judges observing that an agister of cattle is not liable for them at all events, like an innkeeper for the goods of his guest: but ultimately all the Judges agreed that the conviction was right. (r)

\*In a case where, upon an indictment for stealing a window-glass and hammer-cloth from a carriage, it appeared that the prosecutor, in whom the property was laid, was a [\*1133]

l By Gould, J. O. B. 1790, in Wilkins's case, 1 Leach 522, 523.

m 1 Hale 507.

n 1 Hale 513. 1 Hawk. P. C. c. 33. s. 47. 2 East, P. C. c. 16. s. 90. p. 652.

o Iodd's case, O. B. 1711. 2 East, P. C. c. 16. s. 90. p. 653.

p Packer's case, O. B. 1714. 2 East, P. C. c. 16. s. 90. p. 653. 1 Leach 357 note (a).

q 2 East, P. C. c. 16. s. 90. p. 653.

r Woodward's case, Leicester Sum. Ass. 1796, Mich. T. 1796, and Hil. T. 1797, at which last meeting of the Judges 4 Inst. 293. was referred to, as shewing that an agister has a possession, and 2 Rol. Ab. 551. as an authority, that an agister may maintain trespass against any one who takes the beasts. 2 East, P. C. c. 16. s. 90. p. 653. 1 Leach 357, note (a).

coachmaster, and had the care of the carriage, which stood in a coach-house in his yard, at the time the articles were stolen from it; an objection that the property should have been laid in the owner of the carriage was overruled. (s) And a case was at the same time referred to by the court in which a prisoner was convicted of stealing a chariot glass from a lady's chariot which had been put up at a coach-yard, at Chelsea, while the owner of it was at Ranelagh; and the property was laid to be in the master of the yard, where the chariot had been put up. (t)

Ownership,  
where the  
goods are  
in the cus-  
tody of ser-  
vants.

But the indictment will not be sustainable if it appear in evidence that the party in whom the goods are laid had neither the property nor the possession of them; as is usually the case of a feme covert or servant, who have in their custody the goods of the husband or master. (u) But though, generally speaking, the possession of the servant is the possession of the master, (w) yet there are some cases where a kind of special property has been considered to exist in the servant. Respecting the case lately mentioned, of a master delivering money to his servant to carry to a certain place, and then robbing his servant on the road, a learned writer observes, "I see no objection to laying the property of the goods in the servant; for though, in general, it may be said that he has no property in them, as against his masters, although he has against every other person; yet having a clear right to de- [\*1134] fend his possession against A.'s unlawful demand, the special property still remains in the servant. But a taking from the servant of the money or goods of his master, in his presence, by putting in fear, is a taking from the master, and the offender may be indicted for robbing him." (x)

Deakin's  
case.  
Where a  
box was  
stolen from  
a stage-  
coach on  
its journey,  
it was  
holden that  
it might be  
laid as the  
property of  
the driver  
of the  
coach.

The question concerning the sort of possession, or special property, which a servant may have in the goods of his master, was much discussed in a modern case, where a stage-coach having been robbed of a box containing a variety of articles, it became material to determine whether the goods so stolen could be laid as the property of the coachman. There were three counts in the indictment: but one of them which laid the property in the coach-proprietors failed on account of a variance; another, which laid the property in persons unknown, was rejected by the court as improper in this case; (y) and the case, therefore, necessarily proceeded upon the remaining count, which laid the property in the coachman. It appeared in evidence, that the box was delivered by the servant of a tradesman in London to the book-

s Taylor's case O. B. 1735. 1 Leach 356.

t Statham's case, O. B. 1773. 1 Leach 357.

u 2 East. P. C. c. 16. s. 90. p. 652, 653.

w Post. Chap. XIV. On Larceny, &c. by Servants. And ante, 1050. et sequ. as to the

distinction between a bare charge and a possession of goods delivered.

x 2 East. P. C. c. 16. s. 90. p. 654. ante, 1131.

y Post, 1139.

keeper at the inn from which the coach set off, who called it over amongst other things in the way-bill, and delivered it to a porter, who put it into the coach; and that the coachman, in whom the property was laid, drove the coach to a place about thirty-eight miles from London, during which journey the box was stolen from the coach by the prisoners. It also appeared, that the proprietors of the coach never called upon the coachman to make good any losses, except when they happened by his neglect; and that for goods stolen privately from the coach they never expected any compensation from the driver.

The jury having found the prisoners guilty, the case was saved for the consideration of the Judges; and, after it had been ably argued, a majority of the Judges were of opinion \*that the property was well laid to be in the driver. Ho- [\*1135] tham, B., who delivered their opinion, said, that the material question was, whether the driver had the possession of the goods, or only the bare charge of them; but that the case was not open to that distinction: for although, as against his employers the masters of the coach, the mere driver can only have the bare charge of the property committed to him, and not the legal possession of it, which remains in the coachmasters; yet, as against all the rest of the world, he must be considered to have such a special property therein, as will support a count charging them as his goods; for he has in fact the possession of and controul over them; and they are entrusted to his custody and disposal during the journey. And the learned Judge further observed, that the inconvenience would be great indeed, if the law were otherwise: as the difficulties and mistakes which must unavoidably arise in seeking after all the persons concerned as proprietors of a stage-coach, for the purpose of prosecuting an indictment of this nature, would be endless and insurmountable. That the law, therefore, on an indictment against the driver of a stage-coach, on the prosecution of the proprietors, considers the driver to have the bare charge of the goods belonging to the coach; but on a charge against any other person, for taking them tortiously and feloniously out of the driver's custody, he must be considered as the possessor. (z)

Cloaths, and other necessities provided for children by their parents, are often laid to be the property of the parents, especially while the children are of tender age; but it is holden good either way. (a) There are cases, however, of exclusive property in the children. Thus, in a case where the prisoner was charged with stealing wearing apparel the property of John Wilson, and it appeared in \*evidence that [\*1136]

(a) *Beach and Smith (case of)* O. B. 1800, 2 East. P. C. c. 16. s. 91. p. 654. 12 Rep. 113. 2 East. P. C. c. 16. s. 90. p. 652.



the wearing apparel had been furnished by John Wilson to his son George, and that the son was nineteen years of age and bound apprentice to his father, who had covenanted to find him in clothing; the court held that the indictment was defective, and that the wearing apparel was exclusively the property of the son, who had been furnished with it in pursuance of the condition of the indentures. (b) And in a case which occurred at the Old Bailey above a century ago, upon the court doubting whether the property of a gold chain, which was taken from a child's neck who had worn it for four years, ought not to be laid to be in the father, an ancient clerk of the court said that it had always been usual to lay it to be the goods of the child in such case; and that many indictments which had laid them to be the property of the father had been ordered to be altered by the Judges. (c)

Scott's case. Property of sheep laid jointly in a grandfather and grand-children.

[\*1137]

In a case where the prisoner was indicted for sheep-stealing, the property was laid in Simon Dodd the elder, Simon Dodd the younger, and several other persons of the same name. The evidence was, that Simon Dodd the elder, and a son of his, who afterwards died, took a farm on their joint concern, and kept a stock of sheep, which was their joint property, upon it; that the son died intestate about five years ago, leaving a widow, who died soon after him, and several children (being the Simon Dodd the younger and the other persons named in the indictment); that no division was ever made of the stock; and that it was from the same stock that all the sheep upon the farm at the time of the felony committed were bred; some before and some after the son's death. It was also proved, that Simon Dodd the elder continued to occupy the farm and use the stock as before, considering himself as acting for his grand-children, who were still infants, in respect of one moiety; and that \*he accordingly kept a regular account with them in his books. The prisoner having been convicted, a question was submitted to the consideration of the Judges, whether the property were well laid jointly in the grandfather and grand-children. And the Judges were of opinion that it was well laid; for though in the case of joint traders there was no *jus accrescendi*, and the remedy survived; yet here it was proved, by the evidence of the grandfather, that he held one moiety for his grand-children; and he might make distribution among them. And some of the Judges also said, that the property might have been laid to be in the grandfather alone, who was in possession of the children's moiety as their agent. (d)

Gaby's case. The

In another case where the prisoner was indicted for steal-

<sup>b</sup> Forsgate's case, O. B. 1787, 1 Leach 463.

<sup>c</sup> Anon. O. B. 1701, 2 East. P. C. c. 16. s. 91. p. 654. 1 Leach 464, note (a). If apparel be put upon a boy, this is a gift in the law;

for the boy hath capacity to take it. Haynes's case, 12 Rep. 113.

<sup>d</sup> Scott's case, cor. Chambre J. *Northumberland* Sum. Ass. 1801, Mich. T. 1801, 2 East. P. C. c. 16. s. 91. p. 655.

ing some drapery goods, which were stated in the indictment to be the property of Benjamin Dodge and Sarah Chilcott, widow, it was objected that the property in the goods was misdescribed. The facts, upon which the objection was taken, were that the goods in question had been part of the joint stock in trade of Benjamin Dodge, and one Chilcott, the late husband of Sarah Chilcott, who died a short time only before the theft was committed. He died without a will, leaving Sarah Chilcott and some young children; and no administration of his effects had been granted; but Sarah Chilcott, from the time of his death, acted as a partner, and regularly attended the business of the shop. The goods in question were stolen on the 6th of January, after the death of the husband, who died about the Christmas preceding; and on the 20th of January a division was made of the remaining stock in trade; Sarah Chilcott taking one half, and Benjamin Dodge the other half. Upon these facts it was contended, on the part of the prisoner, that the children, in respect of their interest under the statute of distributions, should have been named with Benjamin Dodge and Sarah Chilcott, as joint proprietors; or that the property should have been alleged to be in the ordinary and surviving partner. But the learned Judge, before whom the prisoner was tried, held that the *actual possession* in Benjamin Dodge and Sarah Chilcott, as owners, was sufficient; upon which the prisoner was convicted: and the Judges afterwards, upon the case being saved for their consideration, held that the conviction was right. (e)

*actual possession of the goods by a surviving partner, and the widow of a deceased partner, holden to be a sufficient ownership.*

[\*1138]

A case has been already mentioned, in which, upon an indictment for stealing pheasants, restrained of their liberty, it appeared in evidence that the prosecutor, in whom the property in the pheasants was laid, was not a qualified person to keep or shoot game; whereupon an objection was taken that he could not have any property in them, or any legal possession, sufficient to support the indictment, and was overruled. (f)

*Ownership of game by an unqualified person.*

It is laid down, in some of the books, that larceny cannot be committed of things wherein no person has any determinate property; and, therefore, that the taking away treasure-trove, or waif, or stray, before they have been seized by the persons who have a right thereto, cannot be felony. (g) But it is observed, that there seems to be some incorrectness in the generality of this position; as, although the lord has no determinate property in waifs, treasure-trove, &c. till seizure, the true owner, though unknown, who has lost, or been robbed of the things, has still a property in them. (h)

*Ownership of treasure-trove, estrays, wrecks, &c.*

e Gaby's (Eleanor) case, cor. Chambre, J. *Timmon's Spr. Am.* 1810. MS.  
f Jones's case, ante, 1126.

g 3 Inst. 108. 1 Hale 510. 1 Hawk. P. C. c. 33. s. 58.  
h 2 East. P. C. c. 16. s. 40. p. 406, and s. 88. p. 651.

And as to the reason assigned by one writer for these things not being the subject of larceny, namely, the uncertainty of the true owner, (i) it is observed, that it, at least, implies [\*1139] \*that if the owner be known, larceny may be committed of them. (k)

Ownership where the person of the owner is unknown.

But, further, it is well<sup>4</sup> settled that larceny may be committed by stealing goods, the owner of which is *not known*: and that it may be stated in the indictment that the things stolen were the goods of a person to the jurors unknown. (l) But upon prosecutions of this kind some proof must be given sufficient to raise a reasonable presumption that the taking was felonious, or *invito domino*; and Lord Hale, C. J. said that he never would convict any person for stealing the good *cujusdam ignoti*, merely because the person would not give an account how he came by them, unless there were due proof made that a felony had been committed of those goods. (m) It is said, therefore, with respect to these cases, that the true ground upon which persons, so indicted, may, in any instance, claim to be acquitted, when the other facts, necessary to constitute the crime of larceny, appear upon the evidence, seems to be a want of the proper proof that the taking was felonious, or *invito domino*, and not the want of any property in the true owner, who, by losing his goods, does not lose his property in them until seizure by some other person having a right to seize in such cases. (n)

An indictment cannot be sustained for stealing the goods of a person unknown, if it appear that the owner is [\*1140] really known.

It should be well observed, however, with respect to prosecutions for stealing goods of a person unknown, that an indictment, alleging the goods to be the property of a person unknown, will be improper if the owner be really known; and that in such case the prisoner must be discharged of the indictment so framed, and tried upon a new one for stealing the goods of the owner by name. (o) In a case where the prisoner was charged with stealing a box of goods from a stage-coach, one of the counts of the indictment, which \*stated the box to be the property of persons unknown, was rejected by the court, on the ground that where it was in the power of a pleader to state a legal proprietor, as in this case, by laying the property to be in the persons from whom and to whom the goods were sent, it was improper to lay the property as belonging to persons unknown. (p) And the same principle was acted upon in a case where the indictment charged the prisoner as an accessory before the fact to a larceny; and stated, that "a certain person to the jurors unknown," committed the larceny; and that the prisoner procured the said

<sup>4</sup> Pult. de pace 131. And so also in 3 Inst. 106: the reason is given that *dominus rerum non apparet*.

<sup>k</sup> 2 East. P. C. c. 16. s. 40. p. 606.

<sup>l</sup> 1 Hale 512. 2 Hale 181. 1 Hawk. P. C. c. 33. s. 44. 2 East. P. C. c. 16. s. 88. p. 651.

<sup>m</sup> 2 Hale 290.

<sup>n</sup> 2 East. P. C. c. 16. s. 88. p. 651, *ante*, 1138.

<sup>o</sup> 2 East. P. C. c. 16. s. 88. p. 651.

<sup>p</sup> Deakin and Smith, (case of), 2 Leach 862, *ante*, p. 1134.

"person unknown," to commit it; and it appeared, from the opening of the case by the counsel for the prosecution, that the grand jury had found the bill upon the evidence of the thief, who was about to be called as a witness to establish the guilt of the prisoner. The learned Judge interposed, and directed an acquittal; saying that he considered the indictment wrong in stating that the goods were stolen by "a person unknown;" and he asked how the person, who was the principal felon, could be alleged to be unknown to the jurors, when they had him before them, and his name was written on the back of the bill. (q) This doctrine has been also holden to apply to the case of a receiver of stolen goods; an indictment against whom should state the name of the principal thief, if it be known. (r)

It is said that where felony has been committed by stealing the goods of a person unknown, the king shall have the goods. (s)

The property in the bells, books, or other goods, belonging to a church, has been already spoken of: (t) and we have seen that there can be no property in a dead corpse. (u) If, however, a shroud be stolen from a corpse, it may be laid to be the property of the executors, or whoever else buried the deceased; but not as the property of the deceased himself. (x) And a case is mentioned where several persons were convicted of larceny, in stealing leaden coffins out of the vaults of a church: the coffins being laid as the goods of the executors. (y) If the personal representatives of the deceased cannot be ascertained, or even as it seems if it appear probable, from the time which has elapsed since the death, that it might be a matter of some difficulty to ascertain them, it will be sufficient to lay such goods as the property of "a person unknown." In a case where the prisoner was indicted for stealing a leaden coffin, the property of a person unknown, it was objected that, though the coffin had lain in the ground near sixty years, yet, as the same family, of which the deceased had been a member, remained on the spot, and as it did not appear that any inquiry whatever had been made to ascertain the personal representative, there was a want of reasonable diligence in the prosecutor; but it was ruled to be sufficient after so many years had passed. (z) In the same case it was also ruled that a count, laying the coffin as the property of certain persons being the then churchwardens, could not be supported. (a)

Ownership of goods belonging to a church, and [\*1141] of shrouds or coffins in which corpses are deposited.

q Walker's case, cor. Le Blanc, J. Gloucester Som. Ass. 1812. 3 Cumpb 264.

r Post, Chap. on Receiving Stolen Goods.

s 1 Hawk. P. C. c. 33 s. 44. 2 East. P. C. 16 n. 98 p. 651.

t Ante, Chap. on Sacrilege 364.

u Ante, *Id.* *Ibid.*

x Haynes's case, 12 Co. 113. and 3 Inst.

110, where the theft is called *furtum inauditorium*. 1 Hale 515. 1 Hawk. P. C. c. 33. s. 46. 4 Black Com 236.

y Anon. 2 East. P. C. c. 16. s. 89. p. 652.

z Anon. cor. Buller, J. Exeter Lent. Ass. 1794. 2 East. P. C. c. 16. s. 89. p. 662.

a *Id.* *Ibid.*

Of the ownership of the goods of a deceased person.

[\*1142]

Ownership under particular acts of parliament.

43 Geo. III. c. 59. s. 3. Tools, implements, and materials, belonging to counties, vested, in the surveyor.

55 Geo. III. c. 137. s. 1. Goods, furniture, apparel, &c. provided for the use of the poor, vested in the overseers.

[\*1143]

56 Geo. III. c. 73. Minerals and tim-

If a man die intestate, and the goods of the deceased be stolen before administration committed, such goods shall be supposed to be the goods of the ordinary; but if a man die, having made a will and appointed an executor, the goods shall be supposed to be the goods of the executor, even before probate is granted to him. (b) Neither the ordinary, nor an executor, nor administrator, need shew their title \*specially, it being founded on their own possession; in which case a general indictment lies without naming themselves ordinary, executor, or administrator. (c)

Some cases remain to be noticed, where the ownership of goods, and the mode of describing the property in them, have been regulated by the provisions of particular acts of parliament.

Amongst others, the 43 Geo. III. c. 59. s. 3. enacts, "that the right and property of all tools, implements, timber, bricks, stones, gravel, and other materials, purchased, gotten, or had, by or by the order of justices in counties, or the surveyor of county bridges for the time being, or in any respect belonging to such counties, shall be and the same are hereby vested in such surveyor for the time being; in whom, upon any action or indictment being commenced or prosecuted, such property may be laid."

The 55 Geo. III. c. 137. s. 1. enacts, "that the property of and in all and singular the goods, chattels, furniture, provisions, clothes, linen and wearing apparel, tools, utensils, materials and things whatsoever, had, bought, procured, or provided for the use of the poor of any parish or parishes, township or townships, hamlet or hamlets, place or places, shall be and the same is hereby vested in the overseers of the poor of such parish or parishes, township or townships, hamlet or hamlets, place or places, for the time being, and their successors in office, for the purposes of this act;" and then, after empowering such overseers to bring any action, or prefer any indictment, in respect of such goods, &c. it further enacts, that "in every such action and indictment the said goods, chattels, provisions, clothes, linen, wearing apparel, tools, utensils, materials and things, shall be laid or described to be the property of the overseers of the poor for the time being, \*of such parish or parishes, township, or townships, hamlet or hamlets, place or places, without stating or specifying the name or names of all or any of such overseers." (d)

The 56 Geo. III. c. 73. enacts, that "it shall be lawful and shall be deemed sufficient to all intents and purposes whatsoever, for the conviction of any offender or offenders charg-

b 1 Hale 514. 2 East. P. C. c. 16. s. 89. p. 652.

c 1 Hale 514.

d It further provides, that the act shall not extend to repeal any acts whereby the pro-

perty of such goods, &c. is or may be vested in any other persons, jointly with or independent of the overseers of the poor of any parish, township, &c.



ed in any indictment with grand or petit larceny, for or on account of stealing any minerals, or any timber, iron, or other materials used in or for the working of mines, being the personal property of any company or adventurers carrying on the same, to allege and aver that the minerals, timber, iron, or other materials so stolen, are the property of some one or more of the partners or adventurers in such mining concern, and others his or their partners or co-adventurers, without naming such other partners or co-adventurers; and that such form of describing the property stolen from such company or adventurers shall be, to all intents and purposes whatsoever, as valid and effectual in law, as if the same were averred to be the property of all the owners thereof, and as if the names of all such owners were particularly and distinctly set forth in such indictment."

ber, and other materials used for working mines, may be laid as the property of one or more of the partners or adventurers in the mining concern.

Some of the statutes also, which are merely local and personal, contain provisions of a similar nature; as the 47 Geo. III. sess. 1. c. 30. relating to the *Globe Insurance Company*. That statute enacts, that in all indictments and informations it shall be lawful to state the property of the society to be the property of the treasurer for the time being.

47 Geo. III. sess. 1. c. 30. Property of the *Globe Insurance Company*.

In a case which occurred upon a statute 17 Geo. III. \*c. 17. it was decided, that where an act of parliament gives a corporate capacity and a corporate name to any body of persons, and vests property in them, such property must be stated in the indictment to belong to them in their corporate name, and not in the names of the individual members. The prisoners were indicted for cutting down in the night-time trees growing on Enfield Chase; and the indictment contained two counts, the first, laying the property in the trees as belonging "to Joseph Brown, George Cook, and William Sedcole, then being the churchwardens of Enfield aforesaid;" and the second, laying the property as belonging "to Joseph Brown, George Cook, and William Sedcole, they the said Joseph Brown, George Cook, and William Sedcole, then being the churchwardens of the parish church of Enfield, in the county of Middlesex." It appeared that by the statute 17 Geo. III. c. 17. (which was passed for the purpose of dividing Enfield Chase) the allotment of land from which the trees were taken, was vested in the "churchwardens of Enfield for the time being," and their successors for ever in trust, &c.; but that by a subsequent section of the statute the churchwardens were incorporated by the name of "The Churchwardens of the parish church of Enfield in the county of Middlesex." And the counsel for the prisoner submitted that the indictment was defective in laying the property in the trees as belonging to the individual members composing the corporation by their private names, in-

Patrick [\*1144] and Pepper's case. Where a statute gives a corporate capacity and name to individuals, and vests property in them such property must be laid in an indictment as belonging to them, in their corporate name, and not in the names of their individual members.



stead of laying the property as belonging to the corporation by their public name. On the part of the Crown it was contended, that the private names might be expunged as surplusage.

[\*1145] The court held the objection to be fatal, and said, "The indictment would have been clearly right, if the first clause of the act of parliament which vests the property in the churchwardens for the time being had stood single. But the clause which gives the churchwardens a corporate capacity, and a corporate name, puts an end to the question; for where any description of men are directed \*by law to act in a corporate capacity, their natural and individual capacity, as to all matters respecting the subject of their incorporation, is totally extinct. The present indictment describes the trees to be the property of certain *individuals*, by their names; but the act of parliament shews the property to be in the *corporation*. If an action were brought in the private names of the present prosecutors, for any matter relating to their public capacity, they must unavoidably be non-suited; and, à fortiori, it must be erroneous in a criminal prosecution. But it is said that the private names may be expunged as surplusage. In the first count, supposing them expunged, the remaining description would be 'the churchwardens of Enfield,' which is not the name of the corporation; and therefore that count would still be wrong. In the second count, it is true, the corporate name is used; but the property is not laid to be in the corporation of that name, it is laid to be in the private persons, and the public name is used merely as a description of those persons. The prisoners must therefore be discharged on this indictment." (c)

But where property is vested in trustees not incorporated, nor having a public name given to them collectively, it should be laid in the indictment in their individual names. Sherrington's case.

But where property was vested in certain trustees, under an act of parliament, who were *not incorporated*, nor had any public name given to them collectively; it was holden that the property should have been laid in the indictment as belonging to them in their individual names. This point was decided in a case where the prisoners were indicted for stealing lead, which had been affixed to a workhouse of the poor of a certain place, called the "Old Artillery Ground;" and the property was laid as belonging to "the Trustees of the poor of the Old Artillery ground." It appeared that by the 14 Geo. III. c. 30. certain persons were appointed trustees of the work-house in question, and that all fixtures, furniture, &c. were vested in them; and \*that the act also contained this clause, "and the said trustees are hereby empowered to prefer, or order the preferring of any bill or bills of indictment against any person or persons, who shall

c Patrick and Pepper (case of), O. B. 1783. 1 Leach 253. 2 East. P. C. c. 22. s. 7. p. 1059.

steal, take, or carry away any, or any part of such things; and the monies and things which shall be so stolen, taken, or carried away, shall in every such indictment be laid, and deemed, and taken to be the property of *the Trustees of the Poor of the Old Artillery Ground*. And every indictment so preferred shall be held good in law, to all intents and purposes." The question having been raised, whether the indictment had well laid the property as belonging to "*the Trustees of the Poor of the Old Artillery Ground*:" the court held that it had not; for as the act of parliament had not incorporated the trustees, and by that means given them collectively a *public name*, the property should have been laid as belonging to A., B., C., &c., by their proper names, and the words "*Trustees of the Poor of the Old Artillery Ground*" subjoined as a description of the capacity in which they were authorised by the legislature to act. (*f*)

## SECTION IV.

### OF THE INDICTMENT, TRIAL, AND PUNISHMENT.

It is not intended to enter particularly upon the form of an indictment for larceny, concerning which ample information is given in those works which treat expressly upon the subject of criminal pleading. (*g*) It may be briefly observed, that the prisoner must be charged with the offence in the technical form, "feloniously did steal, take, and carry away;" or, as is said to be most proper when cattle are the subject matter of the larceny, "feloniously did steal, take, and lead away." (*h*) The value of the goods should be stated in order that it may appear whether the offence be grand or petit larceny. (*i*) And it has been abundantly shewn that the property must be laid in some person who has in legal consideration a sufficient ownership for that purpose. (*k*)

With respect to the proper description of the goods stolen, difficulties will sometimes occur. The general rule is given, that they should be described with such a certainty as will enable the jury to decide, whether the chattel proved to have been stolen is the very same with that upon which the indictment is founded, and shew judicially to the court that it could

Indictment.  
Description  
of the  
goods.

*f* Sherrington and Bulkey (case of) O. B. 1789, 1 Leach 513.

*g* Stark. Crim. Plead. 10, *et sequ.* 180, *et sequ.* 426, *et sequ.* 3 Chit. Crim. L. 944, *et sequ.* Cro. Circ. Comp. p. 246, *et sequ.*

*h* 2 Hale 184. 2 East. P. C. c. 16. s. 159. p. 778. Starkie Crim. Plead. 73, 427, 437. 3 Chit. Crim. L. 950. In Stark. Crim. Plead.

73. note (*l*) the learned author says, "It has been said that for stealing a horse, it should be *cepit et abduxit*, for stealing a sheep *cepit et effugavit*; but I find no decision which warrants these unprofitable distinctions."

*i* 2 East. P. C. c. 16. s. 159. p. 778. *Ante*, 1031. *Post*. 1151.

*k* *Ante*, 1129, *et sequ.*

have been the subject matter of the offence charged, and enable the defendant to plead his acquittal or conviction to a subsequent indictment, relating to the same chattel. (l) And it is quite necessary that it should appear, on the face of the indictment, that the thing taken is such whereof larceny may be committed: so that, as we have seen, where the indictment was for stealing a pheasant which *primâ facie* is not a subject of larceny, it was holden to be necessary to state that it was either dead, tame, or confined. (m)

[\*1148] It is also laid down as a rule that, when the subject matter is defined by a statute, the descriptive words contained in the act should be also used in the indictment: and that where the act uses several descriptive terms, one of \*which, being general, includes the more specific term; an indictment would be bad which used the more general instead of the more special description. (n) And an instance is given where an indictment under the statutes 14 Geo. II. c. 6. and 15 Geo. II. c. 34. for stealing a *cow*, was holden not to be sustained by the fact, that the defendant stole a *heifer*; on the ground that as those statutes mention both *heifer* and *cow*, they must be considered as having used one term in contradistinction to the other in describing the several animals they were intended to protect. (o)

We have seen that *bank-notes*, together with many other written securities, are expressly made the subject of larceny by 2 Geo. II. c. 25. (p) It is said to have been formerly the practice, upon all indictments for stealing such property, to set out the notes or other securities at full length; (q) but it is now settled that they may be described in a general manner, and need not be set out verbatim. (r) But still the indictment must follow some of the descriptions of property as given in the statute; so that where a prisoner was charged with stealing “a certain note commonly called a bank-note,” of the value, &c. and convicted, an objection which was taken to this description of the note was referred to the Judges; who all held the indictment ill laid; as, in describing the property stolen, to be “*a note commonly called a bank-note*,” it did not follow any of the descriptions of property in the statute, and in other respects seemed inaccurate. (s)

Johnson's case. “Divers, to wit, nine bank-notes

The necessary description of a bank-note underwent considerable discussion in a late case of an indictment upon the embezzling act 39 Geo. III. c. 85. The indictment charged [\*1149] the prisoner with embezzling “divers, to wit, nine \*bank-notes for the payment of divers sums of money, amounting in

l Stark. Crim. Plead. 181.

m *Ante*, 1126.

n Stark. Crim. Plead. 181.

o Cooke's case, 1 Leach 105.

p *Ante*, 1114.

q 3 M. and S. 541

r 2 East. P. C. c. 16. s. 159. p. 777.

Milne's case, 2 East. P. C. c. 16. s. 37. p. 602.

Johnson's case, 2 Leach 1103 note (a) Stark. Crim. Plead. 429. note (l).

s Craven's case, *Lancaster Sum. Ass.* 1801. Mich. T. 1801. 2 East. P. C. c. 16. s. 37. p. 601, 602.

the whole to a certain sum of money, to wit, the sum of 9*l*. of lawful money of Great Britain, and of the value of 9*l*. of like lawful money:" and, upon error to reverse the judgment, it was objected that none of the cases had determined that such an indictment, containing no description of any particular note whatever, was sufficient: but the court held that this was a sufficient description. Lord Ellenborough, C. J. said, that he considered that after the statute had made bank-notes the subject of larceny, they might be described in the same manner as other things which have an intrinsic value, that is, by any description applicable to them as a chattel; that to describe them as bank-notes for the payment of money seemed to be a larger description than the statute strictly required; and that the indictment in question had set forth number, value, and species, (bank-note being the species, the value 9*l*., and the number nine,) and thereby complied with the strict and technical rule of law. Le Blanc, J. in delivering his judgment, said, "Where a specific thing is made the subject of larceny, it is only necessary to describe it as such specific thing, it being a species of thing that is the subject of larceny. For instance, it is not necessary in charging a larceny of sheep, to describe it either as a wether, ewe, or lamb, yet it cannot be doubted, if such an argument could prevail, that it would be of advantage to the prisoner that it should be described more particularly, because if it were, and the prosecutor, in such case, should fail to prove it to be of that particular description, the prisoner would thereupon be entitled to an acquittal. So also, it may be said of bank-notes; it is not necessary to describe a bank-note particularly, as a bank-note for the payment of 1*l*., 5*l*., or 20*l*. because for whatsoever sum it may be payable, it is still a bank-note. In like manner, in an indictment for stealing an handkerchief, it is not necessary to describe it as a handkerchief of any specific make or materials, as that it is of silk, linen, or any other particular quality. The argument upon this part of the case has arisen from \*the practice that has prevailed of describing the particular sum for which the note is payable, and that the money secured thereby is unsatisfied. But the answer to such an argument is this, that whether it be payable for one sum or for another, it is equally a bank-note, and a bank-note is the subject of larceny. Therefore, this is not a good objection, that the bank-note is not sufficiently set out. No farther description is necessary than is required for other chattels, which are the subject of larceny; and, under the general name of bank-note, the particular species, if the sum for which the note is payable can be said to constitute a species, may be proved." (t)

It appears to have been determined, that notes, bills, &c. within the statute 2 Geo. II. c. 25. should be laid to be the

for the payment of divers sum of money, amounting to the whole to a certain sum of money, to wit, the sum of 9*l*. of lawful money, and of the value of 9*l*. of like lawful money;" held to be a sufficient description of bank-notes, in an indictment on the enjoining, stat. 38 Geo. III. c. 85.

[\*1150]

Bank-notes, &c. should not

be described as chattels.

Conclusion of an indictment on 2 Geo. II. c. 25.

[\*1151]

Indictment for petit larceny.

Trial. Larceny must be tried in the proper county.

But this offence is considered as committed in every county into which the thief carries the goods.

Felonies on navigations may be prosecuted in any county through which the navigation passes.

property of A. B., and ought not to be described as *chattels*: but it was also holden, that upon an indictment which laid them to be "the property and chattels of S. S.," the word *chattels* might be rejected as surplusage. (u)

Where an indictment upon the same statute 2 Geo. II. c. 25. stated the offence to have been committed against the form of the statute, and not of the statutes, it was objected to, on the ground of the statute 2 Geo. II. c. 25. having once expired, and being revived by the statute 9 Geo. II. c. 18. It became unnecessary for the Judges to give any opinion on this objection, another point having been reserved for their consideration; but those Judges who adverted to it thought the form of the indictment good, and that the re-enacting statute was the only statute in force against the offence; (w) and, in a subsequent case, an indictment for stealing bank-notes against the form of the statute was ruled to be good. (x)

\*An indictment for petit larceny only differs from one for grand larceny in this, that the value of the property taken is laid at one shilling or under.

Larceny, like every other offence, must regularly be tried in the same county or jurisdiction in which it was committed: but it must be noted with respect to larceny, that the offence is considered as committed in every county or jurisdiction into which the thief carries the goods; for the legal possession of them still remains in the true owner, and every moment's continuance of the trespass and felony amounts to a new caption and asportation. (y) The late statute 59 Geo. III. c. 27, "That in any indictment for any felony committed on board any barge, boat, trow, or other vessel whatever, employed or used in carrying or conveying goods, wares, and merchandize, or in which any such goods, wares, or merchandize, shall be, in or upon any canal, navigable river, or inland navigation, in any part of the kingdom of *Great Britain and Ireland*, it shall be sufficient to allege that such felony was committed within any county or city through any part whereof such boat, barge, trow, or other vessel shall have passed in the course of the voyage or journey during which such felony shall have been committed; and in cases wherein the sides or banks of any navigable river, canal, or inland navigation, or the centre thereof, shall constitute the boundary of any two counties or cities, it shall be sufficient to allege that such felony was committed in either of the said counties or cities through which, or any part thereof, such boat, barge, trow, or other vessel, shall have passed in the course

u Sadi and Morris (case of), O. B. 1787, and afterwards before all the Judges, 2 East. P. C. c. 16. 37. p. 601.

w Phipoe's case, 1795, 2 East. P. C. c. 16. s. 37. p. 599, 601. *Ante*, 1119.

x Morgan's case, *cor.* Lawrence, J. *Reading Lent Ass.* 1796, 2 East. P. C. c. 16. s. 37. p. 601. Lawrence, J. conferred with Thom-

son, B. on the occasion, who declared his concurrence, considering the reviving statute as in effect re-enacting the provisions of the expired law.

y 3 Inst. 113. 1 Hale 507, 508. 2 Hale 163. 1 Hawk. P. C. c. 38. s. 52. 4 Black. Com. 304. 2 East. P. C. c. 16. s. 156. p. 771.



of the voyage or journey during which such felony shall have been committed; any and every such felony shall and may be inquired of, tried, and determined in the county or city within which the same felony shall be so alleged to have been committed; and all and every person and persons who shall be convicted of any such felony as to be inquired of, tried, and determined, as aforesaid, shall be subject and liable to all such pains of death, and other pains, penalties, and forfeitures, as such person and persons convicted of such felony would have been subject and liable to in case such felony had been inquired of, tried, and determined in the county in which the same felony was actually committed; any law, statute, or usage to the contrary in any wise notwithstanding: Provided always, that nothing herein contained shall extend, or be construed to extend, to affect the jurisdiction of the High Court of Admiralty, or of any commission for the trial of offences under 28 H. VIII. c. 15."

Persons so tried and convicted to be subject to like pains and penalties as if tried in the county where fact was committed.

Therefore, if a man steal goods in the county of A. and carry them into the county of B., he may be indicted for the larceny in the county of B. But it should be observed, that the larceny in the county into which a thief carries the stolen goods may be, in some respects, of a different nature from the larceny in the county in which he first took them: as, if four men steal goods in the county of A. and divide the spoil in that county, and then severally carry their shares into the county of B., the offence in the former county will be *joint*, and one of which the parties may all be convicted upon the same indictment; but in the latter county the offence will be *several*, and the subject of separate prosecutions.

The following case was ruled upon this principle. Four prisoners were indicted for stealing a variety of articles of hardware in the county of *Worcester*. It appeared upon the evidence that the articles in question were made up into a package at Birmingham, and dispatched by the canal from that place to Worcester, to be forwarded down the river Severn to Bristol. The package arrived safely at Worcester, where it was transferred from the canal boat to a barge called the *Blucher*, in which it was to be conveyed a great part of the way down the Severn; namely, to a place called *Brimspill* in the county of *Gloucester*. The prisoners were bargemen on board the *Blucher*; and during the voyage from Worcester to Brimspill, the course of which was nearly equal in the two counties of *Worcester* and *Gloucester*, being about thirty miles in each, the articles in question were stolen from the package; but they were not missed till the barge arrived at Brimspill. At that place the cargo was unloaded, and put on board another vessel, to be carried onwards to Bristol; and the *Blucher* barge returned to Worcester navigated by the prisoners. Suspicion having

Barnett and others (case of.) The four prisoners stole goods in the [\*1152] county of Gloucester, and divided them in that county, and then carried their shares into the county of Worcester, in their separate bags: and it was ruled that this was not a joint larceny in



the county of Worcester, but separate larcenies in that county, and the subject of distinct prosecutions.

fallen upon them, they were apprehended in the county of *Worcester*, when their respective bags were immediately searched, and a portion of the stolen articles was found in each of them. It was then proved, that upon their apprehension, and upon being required to account for the possession of the articles, they stated that the package was broken by accident while on board the *Blucher*, on the voyage from *Worcester* to *Brimspill*, when the articles fell out, and they took them and made a division of them immediately. They did not state at what part of the voyage this transaction took place; but it appeared probable that it took place in the county of *Gloucester*, and there was no evidence to rebut that probability. Upon these facts the learned Judge ruled that the indictment could not be supported against the prisoners as for a joint larceny in the county of *Worcester*, and put the counsel for the prosecution to his election; who accordingly proceeded against one only of the prisoners, who was convicted, and sentenced to transportation. (z)

[\*1153]

Exceptions to the rule that a larceny is committed in every county into which the thief carries the goods.

Exceptions as to Scotland and Ireland, Removed by 13 Geo. III. c. 31. s. 4. and 44 Geo. III. c. 92. s. 7.

\*There are some exceptions to the rule that a larceny is committed in every county or jurisdiction into which the thief carries the goods. For if the original taking be such whereof the common law cannot take cognizance, as if the goods be stolen at sea, the thief cannot be indicted for the larceny in any county into which he may carry them. (a)

A similar exception prevailed also till lately, where the original taking was in *Scotland*. And it appears to have been holden, that a thief who had stolen goods in that country could not be indicted in the county of *Cumberland*, where he was taken with the goods. (b) But after this division the 13 Geo. III. c. 31. was passed; the fourth section of which provided for the trial of such offenders in that part of the united kingdom in which they might have the stolen goods in their possession: and since the union with *Ireland*, a general provision has been made as to this subject by the 44 Geo. III. c. 92. s. 7. which enacts, "that if any person or persons having stolen, or otherwise feloniously taken money, cattle, goods, or other effects, in any one of the parts of the said united kingdom, shall afterwards have the same money, goods, chattels, or other effects, or any part thereof, in his, her, or their possession or custody, in any other part of the united kingdom, it shall and may be lawful to indict, try, and punish, such person or persons, for theft or larceny,

s Barnett, Smith, Burton, and Purser (case of,) *cor.* Holroyd, J. *Worcester* Sum. Ass. 1818. Separate indictments were afterwards preferred against the three other prisoners, (as the grand jury had not been discharged,) to which they pleaded guilty. The learned counsel (Sir Wm. Owen) who was retained to defend them, inclined much to put in the plea of *autrefois acquit* on their behalf; and

only permitted them to plead guilty, on the prosecutor undertaking to recommend them strongly to mercy.

a 3 Inst. 113. 1 Hawk. P. C. c. 33. s. 52.

b Anderson and others (case of) *Carlisle* Sum. Ass. 1763, and before the Judges, Nov. 1763, 2 East. P. C. c. 16. s. 156. p. 772.

in that part of the united kingdom where he, she, or they shall so have such money, cattle, goods, or other effects, in his, her, or their possession or custody, as if the said money, cattle, goods, or other effects, had been stolen in that part of the united kingdom." (c)

\*With regard to the evidence in cases of larceny, it generally consists (unless the prisoner is detected in the fact) of proof of the felony having been committed, and of the goods stolen having been found shortly afterwards in the possession of the prisoner; and upon such proof the general rule will immediately attach, that wherever the property of one man, which has been taken from him without his knowledge or consent, is found upon another, it is incumbent on that other to prove how he came by it; otherwise the presumption is, that he obtained it feloniously. (d) This rule, founded on the necessity of the case, which could never admit of offences of this kind to go unpunished, wherever positive and direct evidence is wanting of the guilt of the party, will probably seldom lead to a wrong conclusion if due attention be paid to the particular circumstances by which such presumption may be weakened, or entirely destroyed. (e) Amongst the most prominent of these will be the length of time which elapsed between the loss of the property and the finding of it in the possession of the prisoner; the probability of the prisoner's having been, at the time of the theft, near the place from which the property was taken; and more especially the conduct of the prisoner from first to last, with respect to the property found in his possession, and the charge brought against him of having obtained it by stealing.

\*Where all that can be proved concerning property found in the possession of a supposed thief is, that it is of the same kind, as that which has been lost; this will not in general be deemed sufficient evidence of its having been feloniously obtained; and some proof of identity will be required. But where the fact is very recent, and the property consists of articles, the identity of which is not capable of strict proof, from the nature of them; the conclusion may be drawn that the property is the same, unless the prisoner can prove the

[\*1154]  
Evidence.  
Rule that where the stolen property is found in the possession of a person, it is incumbent on such person to prove how he came by it.

[\*1155]  
Identity of the property.

c The statutes 45 Geo. III. c. 92. and 54 Geo. III. c. 186. make provision for the more easy apprehending and bringing to trial offenders escaping from one part of the united kingdom to the other, and from one county to another.

d 2 East. P. C. c. 16. s. 93. p. 656. Phil. on Evid. 129, 130.

e That it will sometimes, like every other rule of human institution, fail to guide rightly must be admitted. Lord Hale mentions a case, which he says was tried before a very learned and wary judge, where a man

was condemned and executed for horse-stealing, upon proof of his having been apprehended with the horse shortly after it was stolen; and afterwards it came out that the real thief being closely pursued had overtaken the poor man upon the road, and asked him to walk the horse for him while he turned aside upon a necessary occasion, upon which the thief made his escape, and the man was apprehended with the horse. 2 Hale 289. And it is probable that, upon this rule, receivers of stolen goods are sometimes convicted of stealing them.

contrary. (*f*) Thus, if a man be found coming out of another's barn, and upon his being searched, corn be found upon him, of the same kind as that in the barn, the evidence of the guilt will be pregnant: and cases have frequently occurred where persons employed in carrying sugar and other articles from ships and wharfs have been convicted of larceny, upon evidence that they were detected with property of the same kind upon them, recently upon coming from such places: although the identity of the property, as belonging to such and such persons, could no otherwise be proved. (*g*)

Value of  
the pro-  
perty.

Evidence as to the *value* of the property stolen will also, to a certain extent, be material; as if it exceed the value of one shilling, the offence will be grand larceny; if it be only of the value of one shilling or under, the offence will be petit larceny; (*h*) and if it be of no value, it is not a subject in respect of which larceny can be committed. (*i*) The valuation ought to be reasonable; as it appears that when the statute of Westm. 2. c. 25. was made, silver was but twenty pence the ounce; and at the time Lord Coke wrote, it was worth five shillings, and it is now higher. (*k*) And it is considered as evidently justifiable and proper in juries to strain a point, and find larceny to be under the value of twelve-  
[\*1156] \*pence when it is really of much greater value, if in so doing they only reduce the nominal value of money to the ancient standard. (*l*)

The value  
must be of  
goods  
stolen at  
the same  
time.

It should be observed also, with respect to the goods, the value of which is taken into the computation, that it must appear that they were all stolen at the same time. For though it appears as the received opinion in the older books that a man stealing, at several times, several parcels of goods, each under the value of twelvepence, but amounting in the whole to more, from the same person, might be convicted of grand larceny; (*m*) the severity of this rule is now obsolete; and it is settled that the value of the property stolen must not only be, in the whole, of such an amount as the law requires to constitute grand larceny, but that the stealing must be to that amount at one and the same particular time. For, in fact, where things are stolen at different times, there are different acts of stealing: and no number of petit larcenies will amount to a grand larceny, nor any number of grand larcenies, where it depends on the value of the property stolen, to a capital offence. (*n*) But it seems

*f* 2 East. P. C. c. 16. s. 93. p. 657.

*g* *Id. ibid.*

*h* *Ante*, 1031, 1147.

*i* Phipoe's case, *ante*, 1119. Com. Dig. Ind. G. 2. Stark. Crim. Plead. 186.

*k* 2 East. P. C. c. 16. s. 134, p. 736. *Ante*, 1031.

*l* 4 Black. Com. 239. And see *Id. ibid.*

note (*s*) where it is said that in the reign of Henry I. the stated value, at the exchequer, of a pasture fed ox was one shilling.

*m* See 1 Hale 531. and the authorities there cited.

*n* 1 Hawk. P. C. c. 33. s. 50, 51. 2 East. P. C. c. 16. s. 136. p. 740, Petrie's case, 1

that if the property of several persons lying together in one bundle or chest, upon the same table, or even in the same house, be stolen together at one time, the value of the whole may be put together so as to make it grand larceny, or to bring it within a statute that ousts clergy; for such stealing is one entire felony. (*o*)

In a case where the prisoner was indicted upon the statute of 12 Anne, c. 7. for stealing in a dwelling-house to the \*amount of forty shillings, and the goods found were not proved to amount to forty shillings; the court left it to the jury to consider, upon the facts of the case, whether the prisoner had not stolen the rest of the things which the prosecutor lost, as well as those which had been produced. (*p*)

Goods not produced.

[\*1157]

A prisoner indicted for grand larceny may be convicted of petit larceny only; but not of trespass: for though larceny, as has been before stated, includes a trespass, yet if, upon an indictment, the taking appear not to be felonious, though amounting to trespass, the defendant is entitled to a general acquittal. (*q*) It has been said, that upon taking verdicts on indictments for larceny, the jury ought always to be asked as to the value; and that if they did not find the value, it would be like taking a verdict in a civil action for the plaintiff, without ascertaining the amount of the damages; as it is by the value which they find, that the degree of the offence, whether grand or petit larceny, is determined. (*r*) And it is clear, that they may, if they please, find the goods to be only of the value of twelvepence or under, and so the offence only petit larceny. (*s*) But possibly their proceedings in this respect may be the less regarded at this time, as the consequences of a conviction, whether for simple, grand, or petit larceny are, in the way of present punishment, so nearly similar. (*t*)

Verdict.

At common law the punishments were very different;— that of grand larceny being death, and of petit larceny whipping, or other corporal punishment (now understood to mean imprisonment) less than death. But at this time the offender is always entitled to the benefit of clergy in \*grand larceny, (except in some particular cases which will be presently mentioned) if it be only his first offence; (*u*) and the punishment of petit larceny may, in the discretion of the court, amount to transportation for seven years. (*w*)

Punishment.

[\*1158]

Leach 294, *ante*, 985. Farley's case, *cor.* Ashurst, J. Surrey Lent Ass. 1786. 2 East. P. C. *ibid*.

*o* 1 Hale 531. 2 East. P. C. c. 16. s. 136. p. 740, 741.

*p* Hamilton's case, 1 Leach 351. *ante*, 985. The jury found the prisoner guilty of stealing to the value of forty shillings.

*q* Staundf. 24, b. Kel. 29. Scofield's case,

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Cald. 401. 2 East. P. C. c. 16. s. 134. p. 736. and s. 159. p. 778.

*r* By Willes, C. J. and Chapple, J., O. B. 1740, 2 East. P. C. c. 16. s. 136. p. 741.

*s* 1 Hale 530.

*t* *Ante*, 1031, 1032.

*u* 4 Black. Com. 2.

*w* *Id. Ibid.*

Grand larceny may now be punished by fine or whipping and imprisonment, or transportation; and petit larceny by whipping and imprisonment, or by transportation; as appears by the result of the common law punishments, and the following statutable provisions.

18 Eliz. c. 7. s. 3.  
Imprisonment for a year.

The statute 18 Eliz. c. 7. s. 3. provides that persons to whom clergy is allowed may, for their further correction, be imprisoned for any time not exceeding a year, in the discretion of the justices before whom such allowance is had.

5 Anne, c. 6. s. 2.  
Commitment to the house of correction, &c. for not less than six months, nor more than two years.

The statute 5 Anne, c. 6. (the statute which provided that benefit of clergy should be granted to all who were entitled to ask it, without requiring them to read by way of conditional merit,) enact, that when any person is convicted of any theft or larceny, and burnt in the hand for the same, according to the ancient law, "the Judge or justices before whom such offender or offenders shall be tried and convicted, shall also, at his or their discretion, award and give judgment, that such offender and offenders shall be committed to some house of correction, or public work-house within the county, city, town, or place, where such conviction shall be, there to be, remain, and be kept, without bail or main-prize, for such time as such Judge or justices shall then judge and award, not less than six months, and not exceeding two years, to be accounted from the time of such conviction." (x)

[\*1159]

By a subsequent section, provision is made that a party escaping from such confinement, and being retaken, shall be \*committed for any time not less than twelve months, and not exceeding four years. (y) It has been holden, that under this statute the Judge has a discretion whether he will imprison at all or not. (z)

4 Geo. I. c. 11. Transportation.

The 4 Geo. I. c. 11. s. 1. enacts, that "where any person or persons shall be convicted of grand or petit larceny, or any felonious stealing or taking of money, or goods and chattels, either from the person, or the house of any other, or in any other manner, and who by the law shall be entitled to the benefit of clergy, and liable only to the penalties of burning in the hand or whipping (except persons convicted for receiving or buying stolen goods, knowing them to be stolen) it shall and may be lawful for the court before whom they were convicted, or any court held at the same place with the like authority, if they think fit, instead of ordering any such offenders to be burnt in the hand, or whipped, to order and direct, that such offenders shall be sent, as soon as conveniently may be, to some of his majesty's colonies and plantations in *America* for the space of seven years." (a)

x 5 Anne, c. 6. s. 2.

y *Id.* s. 3.

z 2 East. P. C. c. 16. s. 135. p. 738.

a By 19 Geo. III. c. 74. this transporta-

tion may be to any other parts beyond the seas. *Ante*, 569. And see *ante*, 571, *et seq.* the statutes authorizing the removal of convicts, liable to transportation, to temporary

The 19 Geo. III. c. 74. s. 3. enacts, that instead of burning in the hand, it shall be lawful for the court before which any person shall be convicted of a felony within the benefit of clergy, or any court holden for the same place with the like authority, if such court shall think fit, *b*) “instead of such \*burning or marking, to impose upon such offender such a moderate pecuniary fine as to the court in its discretion shall seem meet; or otherwise it shall be lawful, instead of such burning or marking, in any of the cases aforesaid, except in the case of manslaughter, to order and adjudge that such offender shall be once, or oftener, but not more than three times, either publicly or privately whipped, such private whipping to be inflicted in the presence of not less than two persons besides the offender and the officer who inflicts the same, and such fine or whipping, so imposed or inflicted, instead of such burning or marking, shall have the like effects and consequences to the party on whom the same, or either of them, shall be so imposed or inflicted, with respect to any discharge from the same, or other felonies, or any restitution to his or her estates, capacities and credits, as if he or she had been burned or marked as aforesaid.” (*c*)

19 Geo. III.  
c. 74 s. 3.  
Fine or  
whipping  
instead of  
burning in  
the hand.  
[\*1160]

The following section provides that nothing contained in the act shall deprive the courts beforementioned of the powers then vested in them of imprisoning for any time not exceeding a year, or of committing to the house of correction, or public workhouse, for any time not less than six months, or exceeding two years. (*d*)

But nothing in this act is to deprive the court of the power to imprison.

The 53 Geo. III. c. 162. (after repealing the 52 Geo. III. c. 44. s. 47.) enacts, that “it shall be lawful for any court to pass upon any person convicted before any such court of felony with benefit of clergy, or of any grand larceny, or of any petit larceny, the sentence of imprisonment to hard labour, either simply and alone, or in addition to any other \*sentence which such court may or shall be authorized by law to pass upon any person lawfully convicted of any of the offences aforesaid, as to such court shall seem fit; and such person shall thereupon suffer such other sentence, and be moreover imprisoned and kept to hard labour, or be simply imprisoned and kept to hard labour, in such place and for such time as such court shall think fit to direct, not exceeding the time for which such courts may now imprison for such offences.”

53 Geo. III.  
c. 162.  
Sentence of  
imprison-  
ment to  
hard la-  
bour.  
[\*1161]

places of confinement in this country. See also as to the consequences of escape or return from transportation, *ante*, 565, *et sequ.*

*b* The courts mentioned in the act are those of oyer and terminer or gaol delivery, quarter or general session of the peace, within England, or great session for the county palatine of Chester, or within Wales.

*c* The clause also provided, that in case of

female offenders, the whipping should be in the presence of females only. But now, by the 57 Geo. III. c. 75. it is enacted, that judgment of being publicly whipped shall not be awarded against any female offender.

*d* 19 Geo. III. c. 74. s. 4. See *ante*, 1158, as to the imprisonment. This and the preceding section of the 19 Geo. III. c. 74. are made perpetual by the 39 Geo. III. c. 45.



Particular cases in which persons indicted only for grand larceny are excluded from the benefit of clergy.

25 Hen. VIII. c. 3. s. 3.

It now only remains to notice the particular cases in which persons indicted merely for grand larceny are excluded the benefit of clergy. These arise when it appears upon the trial, that the goods which are the subject of the indictment, and proved to have been in the possession of the offender in the county in which the trial is had, were first taken by robbery or burglary in some other county.

The statute 25 Hen. VIII. c. 3. recites the 23 Hen. VIII. c. 1. and then by s. 3. enacts, that if any person be indicted of felony, for stealing any goods or chattels in any county in *England*, and he thereupon arraigned and found guilty, or stand mute of malice, challenge peremptorily above twenty, or will not directly answer, such persons “shall lose and be put from the benefit of their clergy, in like manner and form as they should have been, if they had been indicted and arraigned, and found guilty, in the same county where the same robbery or burglary was done or committed, if it shall appear to the justices before whom any such felons or robbers be arraigned, by evidence given before them, or by examination, that the same felonies, whereupon they be so arraigned, had been such robberies or burglaries in the same shire where such robberies or burglaries were committed or done, by reason whereof they should have lost the benefit of their clergy by force of the said statute, in case they had been found guilty thereof, in the same shire where \*such robberies or burglaries were so committed and done.” (e)

This statute did not extend to persons outlawed, to offences committed out of *England*, (f) nor to persons indicted for such stealing as is excluded from clergy by subsequent statutes, but the statute 3 W. and M. c. 9. s. 3. enacts that if any person be indicted of felony, for stealing any goods or chattels in any county of *England, Wales*, or town of *Berwick upon Tweed*, and be convicted, or attainted, or stand mute, or will not answer, or challenge peremptorily above twenty, “he or they shall be totally excluded from having the benefit of his or their clergy, if it appear upon evidence or examination before the justices, that the said goods or chattels were taken by robbery or burglary, or in any other manner, in any other county, whereof if such person or persons had been convicted by a jury of the said other county, he or they are excluded, by virtue of this or any other act, from having the benefit of his or their clergy.”

It should be observed of this statute that, like the former one of 25 Hen. VIII., it does not extend to larcenies ousted

e The statute 5 and 6 Edw. VI. c. 10. reciting that this provision of the act 25 Hen. VIII. c. 3. had been virtually repealed by 1 Edw. VI. c. 12. s. 10. expressly revives it, and declares that it shall remain in full

strength and virtue.

f The word *England* in a statute was first made to comprehend and include *Wales* by 20 Geo. II. c. 42. s. 3.

of clergy by subsequent statutes; the words being “*are excluded.*”

The words, “if it appear upon evidence, &c.” are to be intended to mean, where the party pleads not guilty, and is found guilty by the jury; and the words “or by examination” to mean, where the party stands mute, or challenges peremptorily above twenty, or is outlawed, or confesses. (g) And it \*seems that even if the case of a confession upon record does not come within the words of the statute 25 Hen. VIII. (h) it is comprehended in that of 3 W. and M. which applies to persons “convicted or attainted.” (i) And, as to such construction of the former statute, it should be observed, that it is laid down as clear law, that a statute taking away clergy from those who shall be *found guilty*, extends as well to those who shall confess themselves guilty upon record as to those who shall be found guilty by verdict; for, as the latter are found guilty by the jury, so are the former by the court, and their conviction being from their own mouths is of the highest nature possible. (k)

Construc-  
tion of  
these sta-  
tutes.

[\*1163]

It is said to have been the opinion of Eyre, C. J. that these statutes left it discretionary in the Judge whether he would examine into the circumstances of the fact in the other county, so as to oust the prisoner of clergy. (l) But this doctrine has been observed upon, as not supported by principle. (m) Another opinion of the same Judge is, however, said to be deserving of consideration, namely, that in order to oust clergy on the statutes it must be by counterplea to the prayer of clergy. (n)

Qu. if dis-  
cretionary  
in the  
Judge to  
examine in-  
to the facts  
as to the  
other coun-  
ty.

It is said to have been holden by all the Judges, that if the felony whereof a man is found guilty in the county wherein he is indicted be such as needs not the benefit of \*clergy, as amounting only to petit larceny, the offender shall have only the proper judgment for such offence, and no other in respect of the robbery or burglary proved upon the evidence or examination; for being convicted of no offence which will warrant a judgment of death, and consequently having no need to demand his clergy, he cannot be hurt by being excluded from it. (o)

The offence  
must be  
[\*1164]  
grand and  
not petit  
larceny in  
the county  
where the  
trial is had  
to warrant  
the higher  
judgment  
for robbery,  
&c.

In a case tried at the Old Bailey, where upon an indictment for stealing goods of great value, it appeared upon the evidence that the prosecutors were robbed upon the highway in Hertfordshire, and that the goods were found upon the prisoner in Middlesex; and it appeared also that the prisoner

Evidence  
of robbery  
in another  
county.

§ 2 Hawk. P. C. c. 33. s. 82.

h 1 Hale 513.

i 2 East. P. C. c. 16. s. 158. p. 775, 776.

k 2 Hawk. P. C. c. 33. s. 29. In 2 East. P. C. c. 16. s. 158. p. 776. it is said that if the indictment contain an averment that the goods were taken by robbery, &c. in another county, to which the prisoner pleads guilty; that may be thought to get rid of the difficulty; for then the fact will clearly appear to the court

by examination of the record itself.

l By Eyre, C. J. Serjt. Forster's MS. cited 2 East. P. C. c. 16. s. 158. p. 777.

m 2 East. P. C. c. 16. s. 158. p. 777. where the learned author says, “I know no principle whereon to found such a discretion in a Judge to admit or refuse legal evidence.”

n 2 East. P. C. c. 16. s. 158. p. 777.

o 1 Hale 536. Sum. 124. Moor 550. 2 Hale 349, 351. 2 Hawk. P. C. c. 33. s. 83.

was the person who robbed the prosecutors in Hertfordshire; he received sentence of death, and was executed. (*p*) But in another case at the Old Bailey where the prisoner was indicted for larceny, and it appeared that the goods were taken from the owner by robbery in Essex, but there was no evidence that the prisoner was present, except the finding the goods upon him in Middlesex: he had his clergy upon mature deliberation. (*q*)

Entry on  
the record.

It is settled, that it is not necessary to make any entry on the record that it appears by the evidence or examination that the felony was originally commenced in a different county, and was there of such a nature that the offender could not have had his clergy; (*r*) but it is usual to make such an entry. (*s*) And it is also said to be usual to write \*in the margin of the indictment, that it is for robbery, &c. in another county. (*t*)

Accesso-  
ries.—Li-  
berty or  
corporation.

Neither of these statutes, 25 Hen. VIII. c. 3. or 3 W. and M. c. 9. extends to accessories. (*u*) And it has been also observed, that these statutes, speaking only of counties, do not extend to cases where the thief is taken with the goods in a liberty or corporation. (*x*)

[\*1166]

## \*CHAPTER THE SEVENTH.

### *Of Privately Stealing to the Value of Five Shillings in a Shop, Warehouse, Coach-house, or Stable.*

10 and 11  
W. III. c.  
23.

AMONGST the statutes which impose capital punishment upon particular descriptions of larceny, the 10 and 11 W. III. c. 23. still remains, though the propriety of its repeal has been frequently brought under the consideration of the legislature. (*a*) This statute, after reciting that the crime of stealing goods privately out of shops and warehouses, commonly called *shoplifting*, was much increased, enacts, “that all and every person and persons that shall at any time or times, by night or in the day time, in any shop, warehouse,

*p* Butler’s case, O. B. 1720. 2 East. P. C. c. 16. s. 158. p. 776.

*q* Evans’s case, *cor.* Holt, C. J. and two other Judges, O. B. 1706. 2 East. P. C. c. 16. s. 158. p. 776. where a *quære* is put if in this case the evidence of finding the goods on the prisoner were of such a nature as would have been evidence against him of his having committed the robbery in the county where the fact happened.

*r* 1 Hale 518. 2 Hawk. P. C. c. 33. s. 82.  
*s* 2 East. P. C. c. 16. s. 158. p. 776.

*t* 2 Hawk. P. C. c. 33. s. 82.

*u* 11 Co. 31. 1 Hale 520. 2 East. P. C. c. 16. s. 157. p. 775.

*x* 2 East. P. C. c. 16. s. 157. p. 775. But the learned author says, that this, he apprehends, must at least be intended, where such liberty or corporation has jurisdiction of the felony, and the trial is had there.

*a* See as to the measures which have been taken with the view of effecting a repeal of this statute, 6 Ev. Col. Stat. Pt. V. Cl. VII. No. 19. p. 477, 478.

coach-house, or stable, privately and feloniously steal any goods, wares, or merchandizes, being of the value of five shillings or more (although such shop, warehouse, coach-house or stable be not actually broke open by such offender or offenders, and although the owners of such goods, or any other person or persons be or be not in such shop, warehouse, coach-house or stable, to be put in fear) or shall assist hire or command any person or persons to commit such offence," being convicted or attainted by verdict or confession, or being indicted and standing mute, or peremptorily challenging above three-and-twenty, "shall be excluded from the benefit of clergy." The statute does not mention persons outlawed; but the words "hire or command" appear clearly to include accessories *before* the fact. (b)

\*The points which have arisen upon the construction of this statute relate chiefly, either to the taking which shall be considered as *privately* stealing, to the places which shall be deemed *warehouses* within the statute, or to the *kind of property* which the statute was intended to protect. [\*1167]

Construction of the statute.

The words "*privately* steal," appear to exclude all cases where any degree of force is used to come at the goods: (c) and accordingly it is now settled, that if the shop or other place mentioned in the act be broken or entered by means of any force, the case will not be within the statute. (d) And where it appeared that a shop, which had been left safely locked on the Saturday night, was entered and robbed to a large amount between that time and the following Monday morning, by means, as it was supposed, of a false key or picklock, no violence appearing to have been used in gaining admittance, but a desk in the counting-house having been wrenched open, and the lock of it broken, the case was holden not to be within the statute. It was objected at the trial, on behalf of the prisoner, that force having been used by breaking the lock and wrenching the desk open, the offence was not that of privately stealing; and, upon the prisoner being convicted, the case was submitted to the consideration of the twelve Judges, who all held the conviction wrong as to the capital part of the charge, there having been force used: (e) and it seems also to have been considered, that the opening the door with a pick-lock was a force sufficient to take the case out of the statute. (f) But cases, in which it has not appeared whether any force \*were used or not, have been adjudged to be within the statute. (g) [\*1168]

Privately stealing, without force.

b 2 East. P. C. c. 16. s. 78. p. 641. and the authorities there cited to shew that the position of Hawkins, as to the statute being defective, in not mentioning accessories at all, is too general.

c Fost. 79.

d Tims and Cecil (case of), O. B. 1711, Rex v. Cartwright, O. B. 1726, 2 East. P. C. c. 16. s. 79. p. 641.

e Jones's case, Lancaster Lent Ass. 1787. 2 East. P. C. c. 16. s. 79. p. 641.

f *Id. Ibid.* The prisoner was recommended for a pardon, on condition of transportation, as he ought to have been convicted of the simple felony.

g Matthews's case, O. B. 1715. Corder's case, O. B. 1721. 2 East. P. C. c. 16. s. 79 p. 642.

It appears at one time to have been ruled, that in order to shew the stealing to have been committed *privately* in a shop, it was necessary to prove that it was without the knowledge of every person belonging to and in the shop at the time; (*h*) but it has been subsequently holden not to be necessary to call all the persons who were employed in the shop at the time the property was taken. (*i*) It appears to have been holden, that even a suspicion that the prisoner was about to take the goods is sufficient to take a case out of the statute, as it cannot be privately stealing if the taking is in any degree visible. (*k*) And it follows of course, that the slightest perception of the stealing, by any person employed in the shop at the time, will take the case out of the statute. (*l*)

Ware-  
house.

With respect to the meaning of the word "*warehouse*" in the statute, it has been holden not to extend to such warehouses as are mere repositories for goods, but only to such places where merchants and other traders keep their goods for sale, in the nature of shops, and whither customers go to view them. Thus, where the prisoner was indicted for stealing goods, the property of Messrs. Fludyer and Co. in the warehouse of John Day; and (in a second count) for [\*1169] \*Stealing the goods of John Day, in his warehouse; and the evidence was, that John Day kept a common warehouse by the water side, where merchants usually lodged goods intended for exportation, until they could ship them, and that the goods in question were sent by Messrs. Fludyer and Co. to the warehouse for that purpose, and stolen from the warehouse by the prisoner; the court was of opinion, that the case was not within the statute; for though the goods might properly enough be laid as the goods of John Day, who had the charge and possession of them, and was therefore answerable to his principals for them, yet the warehouse in this case was not a place for sale, but merely for safe custody. The prisoner was accordingly, by the direction of the court found guilty of larceny only, and acquitted of stealing privately in the warehouse. (*m*)

In a subsequent case upon this statute, it appeared that the prosecutor was a Blackwell-hall factor, who received his goods by bales or packages from the manufacturing clothiers

*h* Armstrong's case, *cor.* Lawrence, J. *Shrewsbury* Sum. Ass. 1808, MS. And in note (10) 4 Black. Com. 242. it is said, that where there are several shopmen employed in a shop, they must appear at the trial to prove they did not perceive the theft, or the judge will direct the jury to presume that the stealing was not done privately.

*i* Anon. *cor.* Dallas, J. *Shrewsbury* Sum. Ass. 1814, and Stokes's case, *cor.* Dallas, J. *Worcester* Lent Ass. 1816. And it is said (*ex relatione* Sir W. Owen, Bart.) that Lawrence,

J. held this doctrine subsequently to his decision in Armstrong's case, *ante*, note (*h*).

*k* 1 Hawk. P. C. c. 36. s. 7.

*l* By Lawrence, J. in Armstrong's case, *ante*, note (*h*).

*m* Howard's case, Fost. 77, 78. The decision in this case is questioned in *Barringt. Obs. on the Stat.* 487. on the ground that ware-houses at a distance from the dwelling-house were particularly intended to be protected by the statute. But see some remarks upon this observation in the preface to the second edition of Foster, p. xvi, xvii.

in the country, each piece being separately tied up in brown paper, and marked by numbers on the outside. On receiving them into his warehouse, they were sometimes taken out of the bales immediately, but never out of the papers, and done up on shelves: and sometimes they continued in bales till a customer called for such articles as the papers contained. But no goods were ever exposed to sale by hanging them in the warehouse windows, or at the door; nor was the bulk of the pieces ever broke, or sold by retail. They were sold entirely on commission, sometimes for home consumption, and sometimes for exportation. The door of the warehouse sometimes stood open; but in general it was \*kept shut, and fastened by a latch, but not so as to prevent [\*1170] its being opened at pleasure on either side. And upon this evidence the court doubted, whether the place in question could be considered as a “warehouse,” within the intent and meaning of the statute. (n)

As to the *kind of property* which the statute was intended to protect, it may, in the first place, be mentioned, as having been holden, that *money* is not within the act, with regard to any of the places mentioned in it; the words being “goods, wares, and merchandises:” for although the word *goods* may in a large sense take in money, and often does so, yet being connected with “wares and merchandises,” the safer construction of so penal a statute will be, to confine it to goods *ejusdem generis*, goods exposed to sale. (o)

Kind of property within the statute. It does not extend to money.

It has been generally holden, that the meaning of this act with regard to shop-lifting is that the goods must be such as are usually exposed to sale in the shop, and not any other valuable thing which may happen to be put there. (p) If therefore the goods of a stranger only be stolen, the case is not within the statute; which was intended as a security for shop-keepers and traders, in the better protection of their goods. (q) And where a shirt was left in the shop of a third person, to be sent to a sempstress to be mended, and was stolen by the prisoner out of the shop, the stealing was holden not to be within the statute. (r) And a case appears to have gone still further where upon an indictment for privately stealing a watch in a shop, it appeared that the prosecutor had sent the watch to his watchmaker to be repaired, \*and that the watchmaker hung it in the show glass [\*1171] in his shop, from whence it was taken; and it was holden

And it extends only to goods usually exposed to sale in a shop, or warehouse, and to goods usually lodged in coach-houses and stables.

n Godfrey's case, O. B. 1783. 1 Leach 287. The point was not decided. The report states that upon this doubt, and also because there was no proof of the prisoner having been seen in the warehouse, he was acquitted of the capital part of the charge.

o Fost. 79. Herbert's case, O. B. 1720. 2 East. P. C. c. 16. s. 80 p. 643.

p Fost. 78.

q 2 East. P. C. c. 16. s. 80. p. 642.

r Anon. O. B. 1723. 8 Mod. 165. 2 East. P. C. c. 16. s. 8. p. 642.



that as the watch was not in the shop for sale, the prisoner could not be convicted under the statute. (s)

It is also the opinion of a great crown lawyer, that the same equitable construction should take place with regard to warehouses, and that the goods should be such as are usually exposed to sale in those places. (t) And he further gives it as his opinion that though coach-houses and stables, which are likewise named in the act, are not places of sale; yet still, in the construction of so penal a law, it will not be amiss to carry the same equity as far as may be, with regard to them, and hold that the goods should be such as are usually lodged in those places. (u) Accordingly in a case where the prisoner was indicted for stealing a box-coat privately in a stable, and it appeared that the coat was a livery great-coat, which the prosecutor's coachman had hung up in the stables while he went into the house to receive his wages, the court doubted whether such a coat could be considered as any part of the proper and usual furniture of a stable, which seems only to include bridles, saddles, horse-cloths, and such other articles, as are necessary or useful therein; and upon this doubt the prisoner was acquitted of the capital part of the charge. (x) It is said that *horses* seem to be included under the general word "goods," &c. by reason of the mention of coach-houses and stables; and horse-stealers are specified in the subsequent parts of the act. (y)

Prisoner  
[\*1172]  
acquitted  
where it  
appeared  
that he was  
not in the  
shop, but  
waited at  
the corner  
of the  
street.

A case is mentioned where, upon an indictment on this statute for privately stealing a box of lace in a shop, \*the prisoner was acquitted, on its appearing, from the testimony of the man who had actually stolen the lace, and who was admitted as a witness for the crown, that the prisoner was not in the shop at the time, but only waited at the corner of the street to receive the goods. (z)

[\*1173]

## \*CHAPTER THE EIGHTH.

### *Of Stealing from the Person.*

8 Eliz. c.  
4. made  
the offence  
capital,

THE offence of stealing from the person, when committed privily and without the knowledge of the party, was made subject to capital punishment, by the statute 8 Eliz. c. 4—

s Stone's case, O. B. 1784. 1 Leach 334.  
2 East, P. C. c. 16. s. 80. p. 643.

t Fost. 78.

u Fost. 78, 79.

x Seas's case, 1 Leach 304. 2 East, P. C. c. 16. s. 80. p. 643.

y 3 Burn. Just. *Larceny*, S. IV.

z Wild's (Jonathan) case, O. B. 1725

1 Leach 17. note (a)

which after reciting the impudent boldness of cut-purses, or pick-purses, enacted that no person, indicted for the felonious taking of any money, goods, or chattels, from the person of any other, privily, without his knowledge, and found guilty, should be admitted to the benefit of clergy. (a) But this enactment is repealed by a subsequent statute, 48 G. III. c. 129; which, however, at the same time, makes provision for punishing larceny from the person more severely than simple larceny.

but is now repealed.

It enacts, "that every person who shall, at any time, or in any place whatever, feloniously steal, take, and carry away, any money, goods, or 'chattels, from the person of any other, whether privily without his knowledge, or not, but without such force, or putting in fear, as is sufficient to constitute the crime of robbery, or who shall be present, aiding, and abetting therein, shall be liable to be transported beyond the seas for life, or for such term not less than seven years as the Judge or court before whom any such person shall be convicted shall adjudge; or shall be liable, in case the said Judge or court shall think fit, to be imprisoned only, or to be imprisoned and kept to \*hard labour in the common gaol, house of correction, or penitentiary house, for any term not exceeding three years."

48 Geo. III. c. 129. s. 2 makes felonious theft from the person, not being robbery, punishable by transportation for life, or term of years, or by imprisonment. [\*1174]

A question appears to have been made whether a case came within this statute upon the following evidence. The prosecutor was walking up Bond-street, between the hours of eleven and twelve o'clock at night, when the prisoner reeled against him, as if intoxicated, and with such force as to drive him violently against some adjacent palisades and put him off his balance. Immediately, three other men came up, and two of the four took their stand before and two of them behind him; and all of them hustled him; during which transaction one of them contrived to rifle him of his pocket-book, his pocket-handkerchief, and his gloves, and then ran away; but he could not tell which of them it was who so took the things. He immediately pursued them, seized the prisoner (who then appeared perfectly sober), and delivered him into the custody of the constable. He was positive as to the prisoner being the man who first reeled against him; but he thought that the man who rifled his pockets was one of those who had got away. The jury having found the prisoner guilty, the case was submitted to the consideration of the Judges, upon a doubt whether, as the felonious taking appeared to have been with a force sufficient to constitute the crime of robbery, the case was not expressly excepted out of the provisions of this statute, and punishable therefore only as a common larceny; the indict-

Pearce's case. Taking from the person without such force, &c. as would constitute robbery at common law. The statute, 48 Geo. III. c. 129, was not intended to alter the law respecting robbery.

\* 1 Eliz. c. 4. s. 1 & 2. See as to the construction which was put upon this statute, 2 East. P. C. c. 16. s. 119. p. 700.

ment not applying to a case of robbery. The opinion of the Judges was afterwards delivered by Grose, J. who said that it clearly appeared in this case, that there was a felonious taking from the person of the prosecutor, without that degree of force, violence, and intimidation, which is necessary to constitute the crime of robbery at common law. He further said that a question had been raised by the prisoner's counsel, whether the case was within the statute, on the ground that it was uncertain whether the property was taken by the prisoner himself, or by one of his accomplices: [\*1175] \*but, as to that question, though the former statute, 8 Eliz. c. 4. was confined to the person who actually committed the fact, the 48 Geo. III. c. 129. makes the principals in both degrees equally culpable. He also stated it to be clear, from the words of the statute, that the legislature did not mean to alter the law respecting robbery: and that the Judges were unanimously of opinion that the offence, in this case, was properly charged as a taking from the person without force; and that the prisoner. therefore, was properly convicted. (b)

[\*1176]

## \*CHAPTER THE NINTH.

*Of Stealing Horses, Sheep, and other Cattle.*

WE have already seen that larceny may be committed of such domestic creatures as are fit for food; (a) and it remains only to notice in this place the provisions which have been made by particular statutes, which, for the better protection of some of the more valuable domestic animals, make persons, found guilty of stealing them, liable to capital punishment.

Of stealing horses.

The statute, 37 H. VIII. c. 8. s. 2. took away the benefit of clergy from persons convicted of stealing any horse, gelding, mare, foal, or filley; but this statute is repealed by the general words of the 1 Ed. VI. c. 12. which, however, contains provisions of a similar nature, and excludes horse-stealers from the benefit of clergy.

1 Ed. VI.

c. 12. s. 10.

The tenth section of the statute, 1 Ed. VI. c. 12. enacts, "that no person or persons who shall be in due form of the laws attainted or convicted for felonious stealing of horses, geldings, or mares, or being indicted or appealed of any such offence, and thereupon found guilty by verdict, or shall confess the same upon arraignment, or will not an-

<sup>b</sup> Pearce's case, Old Bailey, 1810. 2 Leach 1046. and MS. <sup>a</sup> Ante, 1122. 1124.

swer directly, or shall stand wilfully or of malice mute," shall have the benefit of clergy. It appears that from this statute mentioning the animals in the plural number, a doubt arose whether it would extend to a stealing of one horse, gelding, or mare: and the statute, 2 & 3 Edw. VI. c. 33. was, in consequence, passed; which declares and enacts, "that all and singular person and persons feloniously taking or stealing any horse gelding or mare, shall not be admitted to their clergy but shall be put from the same, in like manner and form as though he or they had been indicted or appealed for felonious stealing of two horses, two geldings or two mares of any other, and thereupon found guilty by verdict of twelve men, or confessed the same upon his or their arraignment, or stand wilfully or of malice mute." 2 & 3 Edw. VI. c. 33. [\*1177]

The statute, 1 Ed. VI. c. 12. s. 10. does not expressly include persons outlawed, or challenging above twenty; but it has been thought a reasonable construction to extend it to such offenders. (b) And even if this construction could not be supported, the statute 3 & 4 W. & M. c. 9. s. 2. seems to oust all such offenders of their clergy; enacting, that if any persons be indicted for any offence for which, by any former statute, they are excluded from clergy upon being convicted by verdict or confession, if they stand mute, will not answer, challenge above twenty, or be outlawed thereupon, they shall not be admitted to their clergy. Construction of these statutes.

From the circumstance of the words of the statute, 37 H. VIII. c. 8. s. 2. being any "horse, gelding, mare, *foal*, or *filley*;" and the words, "*foal*, or *filley*," being omitted in both the subsequent acts of Ed. VI. a question appears, at one time to have been made, whether those acts extended to the stealing of a foal, or filley, so as to oust clergy. But, upon this doubt, it is observed, that the words of those acts are plain and general enough to include a foal, or filley; and that it is refining rather too much to argue those words into doubt from the over nicety of a prior statute which is set aside, (c)

The punishment of *accessories* in horse-stealing is made capital by the 31 Eliz. c. 12. s. 5. which enacts, "that not only all accessories before such felony done but also all accessories after such felony shall be deprived and put from all benefit of their clergy as the principal by statute heretofore made is or ought to be." But it must be observed, upon this statute, that it extends only to such persons as were in judgment of law accessories at the time the act was made, namely, accessories at common law; and not to such as are Accessories in horse-stealing. [\*1178]

† 2 Hawk. P. C. c. 33. s. 62. 2 East. P. C. c. 16. s. 47. p. 615.  
C. c. 16. s. 47. p. 615.

made accessories by subsequent statutes. (*d*) Thus all the Judges agreed that a person, knowingly receiving a stolen horse, who is made an accessory by subsequent statutes, (*e*) is not ousted of clergy. (*f*)

Points relating to horse-stealing arise as in larcenies of other property.

The various points upon the definition of larceny, which have been considered in the chapter treating generally of that offence, (*g*) relate as well to the stealing of horses as of other property; and we may remember a case of considerable nicety, where, upon a finding by the jury that the prisoners took some horses, merely with intent to ride, and afterwards to leave them, and not to return, or make any further use of them, it was holden that such taking amounted to a trespass only, and not to larceny. (*h*)

Petit larceny of a horse.

It should not be forgotten either that by the opinion of a great lawyer, if a man could possibly steal a horse worth only twelvepence, it would be but petit larceny: (*i*) and that this doctrine was acted upon in a case where, the prisoner being indicted for stealing a gelding of the value of twenty-three shillings and sixpence, it appeared, upon the evidence, that the horse was a worthless animal turned upon a common, and, as the witnesses said, fit only for a dog-horse: upon which Mr. Justice Foster recommended it to the jury

[\*1179]

\*to find the prisoner guilty to the value of twelvepence, which they did; and he was transported. (*k*)

Of stealing sheep and other cattle, 14 Geo. II. c. 6.

With respect to the stealing of sheep and other cattle, the 14 Geo. II. c. 6., after reciting "that evil disposed persons had, more generally and frequently than was ever known before, made it their practice secretly in the night time to drive away and steal great numbers of sheep, and likewise secretly in the night time to kill great numbers of sheep, and to strip off their skins, and then steal the carcasses of the sheep so killed, leaving their skins behind to prevent discoveries; and also in like manner to kill great numbers of sheep, and then cut open the sheep so killed, and take out and steal their inward fat, leaving their carcasses behind to prevent being discovered," enacts "that if any person or persons shall feloniously drive away, or in any other manner fe-

*d* Fost. 372, 373. 2 East. P. C. c. 16. s. 47. p. 616.

*e* Post. Chap. XXI. on *Receiving Stolen Goods*.

*f* Anon. East. T. 2 Anne. Fost. 373.

*g* Ante, 1033. *et sequ.*

*h* Phillips and Strong (case of) ante, 1037.

*i* 1 Hale 531.

*k* Pearles's case, Bedford 1755. 2 East. P. C. c. 16. s. 137. p. 741. And see ante, 1031. A curious point respecting the property, under particular circumstances, in an old and worn-out horse, which recently underwent some discussion, may be briefly mentioned in this place. A. ordered his ser-

vant to destroy an old and favourite horse, and bury it. The servant directed one of A.'s labourers to execute the order; who, instead of doing so, took the horse to a neighbouring town, and sold it to a tanner for fifteen shillings. Upon these facts application was made to a magistrate to commit the labourer for horse-stealing; but the magistrate, entertaining doubts upon the subject, took an opportunity of mentioning the case to one of the Judges, then on the circuit, who was of opinion that A. had so disclaimed all property in the horse that it could not be the subject of larceny. See as to a dereliction of property by the owner, ante, 1042.

feloniously steal, one or more sheep or other cattle of any other person or persons whatsoever, or shall wilfully kill one or more sheep or other cattle of any other person or persons whatsoever, with a felonious intent to steal the whole carcase or carcasses, or any part or parts of the carcase or carcasses of any one or more sheep or other cattle that shall be so killed, or shall assist or aid any person or persons to commit any such offence \*or offences; that then the person or persons guilty of any such offence, being thereof convicted in due form of law, shall be adjudged guilty of felony, and shall suffer death, as in cases of felony, without benefit of clergy.” [\*1180]

The words “other cattle” in this statute were of two uncertain signification, and, consequently, the 15 Geo. II. c. 34, reciting that it was doubtful to what sorts of cattle besides sheep the act was meant to extend, enacts and declares, “that the said act was meant and intended, and shall be construed, deemed, and taken to extend to any bull, cow, ox, steer, bullock, heifer, calf, and lamb, as well as sheep, and to no other cattle whatsoever.”

15 Geo. II. c. 34. restrains the words “other cattle” to a bull, cow, ox, steer, bullock, heifer, calf, and lamb.

The doctrine that any the least removal of the thing feloniously taken, will constitute larceny, (*k*) applies to the stealing of sheep, though part of the animal only be taken, and though the statute 14 Geo. II. c. 6. might seem in such case to make the offence of a different and specific kind. In a case where the prisoner was indicted for stealing six lambs, without any count for killing with intent to steal the carcase or any part thereof, the evidence was that the carcasses of the lambs, without their skins, were found upon the premises where they had been kept, and that the prisoner had sold the skins on the morning after the offence was committed; upon which the jury were directed to find the prisoner guilty, on the ground that the lambs must have been removed from the fold. But a doubt having occurred whether, as the statute 14 Geo. II. c. 6. specifies feloniously driving away, and feloniously killing with intent to steal the whole or any part of the carcase, as well as feloniously stealing in general, (although there must, in such cases, be some removal of the thing,) it did not intend to make these different offences; the case was submitted to the consideration \*of the Judges, who held the conviction right; as any removal of the thing feloniously taken constitutes larceny. (*l*)

Rawlins's case. The prisoner was indicted for stealing lambs, and the evidence was that the carcasses were found in the ground of the owner, and the skins only taken away: and a conviction upon this evidence was holden good.

In a case where the prisoner was indicted for stealing a cow, it appeared, upon the evidence, that the animal stolen was a female beast only two years and a half old that had never had a calf; and that a female beast of the cow kind,

[\*1181]

Cook's case. An indictment for stealing a cow held

*k* *Ante*, 1034.

*l* Rawlins's case *Sarum Sum. Ass.* 1800.

and *Mich. T.* 1800. 2 East P. C. c. 16. s. 48. p. 617



not to be supported by evidence of stealing a *heifer*.

how old soever, if she have never had a calf, is always called a *heifer*. An objection was therefore taken, by the counsel for the prisoner, that the charge in the indictment was not supported by the evidence; and, the prisoner being found guilty, the question was referred to the consideration of the twelve Judges, who were of opinion, that as the statute mentions both *heifer* and *cow*, it must be considered as using one term in contradistinction to the other, in describing the several animals intended to be protected; and that, as the beast stolen was not therefore such as was described in the indictment, the prisoner was entitled to an acquittal. (m)

26 Geo. III. c. 71. as to slaughtering cattle.

Slaughter-  
[\*1182]  
ing cattle without a licence, or giving proper notice, &c. made felony.

As the statute 26 Geo. III. c. 71., was passed in order to remedy (according to the recital of the act) the facilities afforded to the stealing of cattle by persons of low condition, who kept houses or places for the purpose of slaughtering horses and other cattle, its provisions may be shortly mentioned in this place. It contains many enactments, for the regulation of slaughter-houses; requires persons keeping them to take out a licence, and to give notice, previous to the slaughtering and flaying of any cattle, to an inspector appointed as mentioned in the act; and to kill and flay the cattle only within certain hours. The eighth section enacts that if any person keeping or using any slaughtering-house \*or place mentioned in the act, shall slaughter any cattle for any other purpose than for butcher's meat, or shall flay any cattle brought dead to such slaughtering-house or other place without a licence, or without giving notice, or shall slaughter or flay at any time except within the hours limited by the act, or shall not delay slaughtering or killing according to the direction of the inspector properly authorised, such person so offending in either of these cases and being convicted shall be adjudged and taken to be guilty of felony, and shall be punished by fine and imprisonment and such corporal punishment by public or private whipping, or shall be transported for any time not exceeding seven years, as the court before whom the offender shall be tried and convicted, shall direct. (n)

Destroying or burying hides, misdemeanor.

The ninth section enacts, that persons keeping or using such slaughtering-house or place, and throwing into lime, or rubbing therewith, or with any other corrosive matter, or destroying, or burying hides of cattle slaughtered or flayed by them, shall be guilty of a misdemeanor, punishable by fine, imprisonment, and whipping. The statute also creates other offences of smaller degree, and imposes penalties recoverable by summary proceedings before justices of the peace. (o) The fourteenth section provides, that the act shall not extend to

Exceptions.

m Cook's case, *Warwick Lent Ass.* 1774, and *Serjeants' Inn Hall*, 1774. 1 Leach 105. 2 East. P. C. c. 16. s. 48. p. 616.

n See a precedent of an indictment against the keeper of a slaughter-house, for slaugh-

tering a horse without giving the proper notice, 3 Chit. Crim. L. 721.

o See the statute, and 2 Burn. Just. *Horses*, Sect. IV.

any currier, feltmaker, tanner, or dealer in hides, who shall kill any distempered or aged cattle or purchase any dead cattle for the *bonâ fide* purpose of selling, using or curing the hides thereof, in the course of their respective trades; nor to any farrier employed to kill aged and distempered cattle; nor to any person who shall kill any of their own or other cattle, or purchasing any dead horse or other cattle, to feed their own hounds or dogs, or giving away the flesh for the like purpose. But it is further enacted, that if any collar-maker, currier, &c., or other person shall, under colour of [\*1183] their trades, knowingly or willingly kill any sound or useful horse, gelding, mare, foal, or filley, or boil or otherwise cure the flesh thereof, for the purpose of selling it, such person shall be deemed an offender within the meaning of the act, and, for every offence, forfeit any sum not exceeding twenty, nor less than ten pounds. (p)

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**\*CHAPTER THE TENTH.**

[\*1184]

*Of Stealing and Destroying Deer. (1)*

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**\*CHAPTER THE ELEVENTH.**

[\*1192]

*Of Stealing Conies.*

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**\*CHAPTER THE TWELFTH.**

[\*1197]

*Of Stealing Fish.*

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**\*CHAPTER THE THIRTEENTH.**

[\*1206]

*Of Stealing to the Value of Forty Shillings in any Vessel upon a Navigable River, &c.; and of Plundering Vessels in Distress, or Wrecked. (2)*

p 26 Geo. III. c. 71. s. 15.

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(1) This and the three following chapters, which relate wholly to the statutes of Great-Britain, are omitted.

(2) The statutes of the several states provide for the punishment of these offences.

## \*CHAPTER THE FOURTEENTH.

## Of Larceny by Servants.

BEFORE entering upon the subject of larceny committed by servants of the goods of their masters at common law, it will be proper to notice two statutes relating to larcenies by servants, though the occasion upon which the first of them was passed may be considered as having gone by, and the latter of them is but little resorted to at the present day.

33 Hen. VI.  
c. 1. As to  
servants,  
violently  
and riot-  
ously mak-  
ing spoil of  
their mas-  
ter's goods  
upon the  
death of  
their mas-  
ters.

It appears that menial servants were considered by the common law as being *quodammodo* in possession of their master's household goods between the time of his death and the ascertainment of his legal representative; and their embezzling such goods being therefore holden not to be felony, the 33 Hen. VI. c. 1. was passed in order to remedy the evil consequences of this doctrine. (a) This statute recites that divers household servants of lords or other persons of good degree, shortly after their masters' deaths, violently and riotously had taken and spoiled the goods which were of their said masters at the time of their death, and distributed the same amongst them, &c. and then enacts "that after full information made to the chancellor, by the executors (or any two of them) of such lord or person, of such riot, taking, and spoil made, &c. the said chancellor, by the advice of the chief justices of the King's Bench, and Common Pleas, and the Chief Baron of the Exchequer, or two of them, may make out writs to such sheriffs \*as seem necessary to make open proclamation (as therein directed (for the said offenders to appear before the court of King's Bench on the day limited by the writ, &c.; whereupon if they make default, &c. they shall be attainted of felony: but if they appear, they shall be committed or bailed, until they answer the said executors in such actions as shall be brought against them for the said riot, taking, and spoiling." &c. This statute therefore in effect enacts, that if the party do not appear, he shall answer for the offence as felony: but that if he appear, he may be sued as for a trespass. The statute extends to one executor, if but one. (b)

[\*1213]

21 Hen.  
VIII. c. 7.  
Servants to  
whom any  
goods and  
chattels are  
delivered to  
keep by  
their mas-

The statute 21 Hen. VIII. c. 7. recites that divers of the king's subjects had, upon confidence and trust, delivered unto their servants their caskets and other jewels, money, goods, and chattels, safely to keep to the use of their said masters or mistresses, and that after such delivery the servants had withdrawn themselves, and gone away with the said caskets, &c. or part thereof, to the intent to steal the

a 1 Hale 515. 1 Hawk. P. C. c. 43. s. 9.

b 1 Hale 654. 2 East. P. C. c. 16. s. 9. p. 560.

same, and defraud their masters or mistresses thereof; and sometimes, being with their masters or mistresses, had converted the said jewels, &c. or part thereof, to their own use; which misbehaviour so done was doubtful in the common law whether it were felony or not: and it then enacts "that all and singular such servants, to whom any such caskets, jewels, money, goods, or chattels, by his or their said masters or mistresses, shall from henceforth so be delivered to keep, that if any such servant or servants withdraw him or them from their said masters or mistresses, and go away with the said caskets, &c. or any part thereof to the intent to steal the same, and defraud his or their said masters or mistresses thereof, contrary to the trust and confidence to him or them put by his or their said masters or mistresses; or else, being in the service of his said master or mistress, without assent or commandment \*of his master or mistress, he embezzle the same caskets, &c. or any part thereof, or otherwise convert the same to his own use with like purpose to steal it; that if the said caskets, &c., that any such servant shall so go away with, or which he shall embezzle with purpose to steal it, as is aforesaid, be of the value of forty shillings or above, that then the same false, fraudulent, and untrue act or demeanor, from henceforth shall be deemed and adjudged felony; and he or they so offending, be punished, as other felons be punished for felonies committed, by the course of the common law." (c)

ters, and who go away with or embezzle the same, being of the value of forty shillings, or above, declared to be guilty of felony.

[\*1214]

The second section provides that the act shall not extend to any apprentice, nor to any person within the age of eighteen years.

S. 2. Act not to extend to apprentices, nor to persons under 18.

Clergy.

Clergy was taken away from this offence by the statute 27 Hen. VIII. c. 17. but that act having been repealed, (d) the offender is now entitled to his clergy, unless the offence be committed in a dwelling-house, or out-house thereunto belonging, within the statute 12 Ann. c. 7.

Construction of the statute.

The statute extends only to such persons as were servants to the owners of the goods, both at the time of the delivery and when they were stolen; so that if A. deliver goods to B. to keep, and afterwards take him into his service, and then B. run away with the goods, it is not felony within this statute, because the goods were not originally delivered under the special trust of a servant. (e)

Such goods only are within the statute as are delivered to keep for the use of the master, to be returned to him again. So that a receiver who runs away with his master's rents, received by him for his master, or a servant who \*being en-

Goods, &c. within the statute.

[\*1215]

c By the 5 Eliz. c. 10 this act, which had been repealed by the general words of 1 Mar. St. 1. c. 1. s. 3., was revived, and made perpetual.

d By 1 Mar. St. 1. c. 1. s. 5.

e 1 Hawk. P. C. c. 43. s. 4. Sum. 63, 2 East. P. C. c. 16. s. 11. p. 562.

[\*1218]

sider this statute of 21 Hen. VIII. as in the nature of a declaratory law; (x) and this view of it seems to be confirmed by the doctrine that, notwithstanding the exception contained in it as to apprentices and servants under the age of eighteen, \*(y) yet such persons taking their master's goods delivered to them by way of charge are guilty of felony at common law. (z)

In support of this maxim of the common law here laid down, it will be proper to cite some of the more modern cases in which it has been recognised.

Paradice's case.

The prisoner who was employed as a foreman and bookkeeper, not residing in the house of his master, embezzled a bill of exchange, which he received from his master to be transmitted to a correspondent, in the usual course of business, and it was holden to be larceny.

The prisoner was indicted for stealing a bill of exchange of the value of 100*l.* the property of the prosecutor. It appeared in evidence, that he was foreman and bookkeeper to the prosecutor, who was a mercer at Devizes, at a yearly salary, and paid and received money for him, not living in the house, but going there every day to transact his business. The prosecutor delivered bills to him to the amount of 1500*l.*, and amongst them the bill in question, with directions to enclose them in different covers, and send them by that day's post, as he had often sent bills before, to his correspondent in London, as cash to be carried to the credit of the prosecutor's account. The prisoner did not send the bills as he was directed; and the next day, having obtained the prosecutor's leave to go to visit some relations in the neighbourhood, he went to Salisbury, got cash for the bill in question, which had been indorsed by the prosecutor, and was also indorsed by the prisoner, and then went off; but was afterwards apprehended at Exeter, with part of the bills and the money. It was contended on behalf of the prisoner at the trial, that the prosecutor, having delivered the bills to him, had thereby parted with the possession of them, so that the prisoner could not be guilty of felony in taking them away; and the case was resembled to that of a carrier intrusted to carry goods. (a) But the prisoner was convicted; and judgment was respited, in order to take the opinion of the Judges, whether the case amounted to felony, or was only a breach of trust. They were all of opinion (with the exception of Lord Camden, who was absent,) that the case amounted to larceny; upon the principle that the possession still continued in the master. (b)

[\*1219]

A carter going away with his master's cart was holden to have been guilty of felony. (c)

Robinson's case.

Bass's

The prisoner was convicted of stealing gauze of the va-

x By Gould, J. in delivering the opinion of the Judges in Wilkins's case, 2 East. P. C. c. 16. s. 14. p. 565. s. 10*l.* p. 673. *Ante*, 1070, 1071.

y *Ante*, 1214.

z 1 Hale 667, 668.

a *Ante*, 1092, *et seq.*

b Paradice's case, *cor.* Gould, J. *Sarum* Lent Ass. 1766. East. T. 1766. 2 East. P. C. c. 16. s. 15. p. 565. and cited by Gould, J. in Wilkins' case, 1 Leach 523, 524.

c Robinson's case, O. B. 1755. 2 East. P. C. c. 16. s. 15. p. 565.

lue of eighty pounds, the property of the prosecutor : and the case was referred to the consideration of the twelve Judges, upon the following facts. The prisoner was servant and porter in the general employ of the prosecutor, who was a gauze-weaver, and was sent with a package of goods from his master's house, with directions to deliver them to a customer at a particular place. In his way he met two men, who invited him into a public-house to drink with them, and then persuaded him to open the package, and sell the goods to a person whom one of the men brought in ; which he accordingly did, by taking them out of the package, putting them into the man's bag, and receiving, to his own use, part of the money for which they were sold. All the Judges held this to be felony, on the ground that the possession of the goods still remained in the master. (*d*)

In a case where the prisoner had been convicted for stealing forty bushels of oats, a question, whether the facts amounted to felony, was reserved for the opinion of the Judges. The prosecutors, who were cornfactors, had purchased a cargo of oats on board a ship, lying in the river Thames ; and they sent the prisoner, who was employed in their service as a lighterman, with their barge to one Wilson, a corn-meter, for as much oats, in loose bulk, as the \*barge would carry. The prisoner proceeded to the ship, and received from Wilson two hundred and twenty quarters of oats, in loose bulk, and five quarters in sacks. The five quarters were put into sacks by the order of the prisoner ; and were afterwards embezzled by him. The question submitted to the Judges was, whether this was felony, as the oats had never been in the possession of the prosecutor ; or whether it was not like the case of a servant receiving charge of, or buying, a thing for his master, and never delivering it. And the Judges held that it was larceny in the prisoner ; and a taking from the actual possession of the owner, as much as if the oats had been in his granary. (*e*)

The following is a case of a similar nature. The prisoner was indicted (as in the former case) upon the statute, 24 Geo. II. c. 45. for stealing five quarters of oats from a vessel on the navigable river Thames. The prosecutors, in whom the property was laid, were cornfactors : and the prisoner was their servant ; and had been employed by them, many years, in superintending the unloading of their corn vessels. The prosecutors had purchased two hundred and forty quarters of oats, on board a Dutch vessel, lying in the river Thames ; and while the corn-meters were in the act of

case. The prisoner, who was a servant and porter in the general employ of the prosecutor, had goods delivered to him by his master to carry to a customer, which he sold, &c. this was holden to be larceny.

Spears's case.

A cornfactor having purchased a cargo of oats on board a

[\*1220] ship, sent his servant with his barge to receive part of the oats in loose bulk : &c.

which he afterwards embezzled : this was holden to be larceny.

Abraham's case.

The prosecutors, being cornfactors, purchased corn on board a vessel, and sent their barge to receive it

*d* Bass's case, 1 Leach 221, 222, 224. 2 East. P. C. c. 16 s. 15, p. 566.

*e* Spears's case, Kingston Sp. Ass. 1793. 2 Leach 925. 2 East. P. C. c. 16 s. 16, p.

563. And see the ground of the determination, as in the text, mentioned by Heath J. in Welsh's case, 4 T. R. 276.



in bulk ;  
when their  
servant,  
who was  
employed  
by them to  
superintend  
the delive-  
ry, separa-  
ted a part  
from the  
rest, while  
on board  
the vessel,  
[\*1221]  
and em-  
bezled it :  
and it was  
holden to  
be larceny.

unloading the oats from the Dutch vessel into the prosecutors' barge, the prisoner, with another person, came along side in a boat, handed ten empty sacks on board the Dutch vessel, and desired that the sacks might be filled with oats, and tied, as they were going to be put into an up-country lug-boat. He also desired that the account of the oats, put into the sacks, might be carried to the score, and no separate account be made of them. The whole of the two hundred and forty quarters of oats, excepting the five quarters put into the sacks by the prisoner's desire, were loaded, in loose bulk, into the prosecutors' barge. After the sacks were filled, a \*person, by the prisoner's direction, took them away from the vessel to a place where they were delivered to the person who purchased them of the prisoner. The prisoner had never been employed by the prosecutors to sell corn for them ; nor was he authorized so to do.

Upon these facts the jury found the prisoner guilty ; and, the case being saved for the opinion of the Judges, they were of opinion that the conviction was right. (f) It is observed that in this case there appears to have been a tort committed by the servant in the very act of the taking ; that the property of his masters in the corn was complete before the delivery to him ; and that, after the purchase of it in the vessel, they had a lawful and exclusive possession of it as against all the world, but the owner of the vessel. (g)

Lavender's  
case.  
Holden  
that a ser-  
vant going  
off with  
money, and  
applying it  
to his own  
use, is guilt-  
y of larceny.

A servant going off with money, given to him by his master to carry to another, and applying it to his own use, has been holden guilty of larceny. The master of the prisoner delivered to him a sum of money to carry to a person of the name of Flawn, and to leave it with Flawn, who had agreed to give the master of the prisoner bills for the money in the course of a few days. The prisoner did not carry the money to Flawn, as he was directed, but went away with it ; and, with part of it, purchased a watch, and some other articles ; the other part remaining in his possession when he was apprehended. The jury having found the prisoner guilty, sentence was respited, in order to take the opinion of the Judges, whether this was felony, or only a breach of trust : and all the Judges held that it was felony. (h)

Atkinson's  
case.

[\*1222]  
A servant  
obtained  
ten gui-  
neas, from  
her mis-  
tress, un-

In a case where the prisoner was indicted for stealing ten \*guineas, it appeared that she was the menial servant of the prosecutor, who was a manufacturer, and frequently in want of silver to pay his workmen : that she went to the wife of the prosecutor, and told her that she was acquainted with a person who could give her ten guineas' worth of silver ; upon which the wife of the prosecutor gave her ten guineas for the

f Abrahams' case, *Surrey Spr. Ass.* 1798. 2 Leach 824. 2 East. P. C. c. 16. s. 16. p. 569.

g 2 East. P. C. c. 16. s. 16. p. 570.

h Lavender's case, *Huntingdon Lawd. Ass.*

1793. twice considered by the Judges.—East. T. 1793, and Trin. T. 1793. In this case all the Judges also held that the last point in Watson's case (*ante*, 1215.) was not law

purpose of getting them changed into silver by the person she had mentioned, when, instead of getting the guineas changed, she immediately ran away with them, and never returned; and it also appeared that her cloaths had been previously taken away. Upon this evidence she was found guilty of larceny. (i)

It has also been holden to be larceny for the confidential clerk of a merchant to take a bill of exchange, unindorsed, from its proper repository, discount it, and convert the proceeds to his own use, though he had the general management of his master's cash concerns, and authority to get his bills discounted. The indictment against the prisoner was for stealing a bill of exchange for one hundred and twenty-two pounds twelve shillings, the property of the prosecutors, Messrs. Burkit and Fothergil. Upon the evidence it appeared that the prisoner was clerk to the prosecutors, and had the sole management of their cash concerns: that he received bills and money remitted to them, took bills to be discounted whenever he wanted cash, made payments for freight and other things of a similar nature, and settled the balance with the prosecutors at the end of every week. On the 14th September, 1795, the bill in question was remitted to the prosecutors, by the post, when one of them opened \*the letter, and gave the bill, which was not due till the 17th September, to a clerk to get it accepted; which the clerk accordingly did, and then laid it amongst other bills on the desk of the prosecutors. On the 16th September the prisoner carried the bill in question, together with another bill, to the prosecutors' bankers, when the bankers' clerk, observing that neither of them were indorsed by the prosecutors, asked him whether they were to be entered short or discounted; upon which he said that he wanted small notes and money for them, and that the money must be full weight, and good, as it was for the particular use of the prosecutors. On the same day he absconded with the monies he had so received, and was taken, under a feigned name, from on board a ship, at Falmouth. It was contended on behalf of the prisoner that, the bill having come legally into his possession like any other bill of the prosecutors over which he had a disposing power, he had a right to receive the money for it, though not to convert the money, when received, to his own use; and that, the first taking of the bill not being tortious, his receiving the money for it at the bankers, and going away with the money, was a mere breach of trust, and no felony. But Heath, J. was

der a pre-  
tence that  
she knew a  
person who  
would give  
silver for  
them; and  
then ran  
away with  
the guineas:  
guilty of  
larceny.

Chip-  
chase's  
case.

A clerk  
who had  
the man-  
agement of  
the cash  
concerns of  
the prose-  
cutors, and  
had au-  
thority to  
get their  
bills dis-  
counted, as  
occasion  
required,

[\*1223]  
discounted  
a bill, and  
absconded  
with the  
money;  
and it was  
holden to  
be larceny.

\* Atkinson's (Anne) case, 1 Leach, 302, 303, note (a). There is subjoined "Sed quare, if the case was not saved?" The doubt in this case would be whether the property in the guineas was not so parted with by the wife of the prosecutor, as to exclude the idea of felony. (*ante*, 1054). But it should

seem that it might be well contended that the property in the Guineas was not parted with to the prisoner; and that she had only the possession of them upon a bare charge, or special trust, to get them changed. *Intc.* 1050, *et seq.*

clearly of opinion that this was felony ; the bill having been once decidedly in the possession of the prosecutors, by the clerk, who got it accepted, putting it amongst the other bills on the prosecutors' desk ; and the prisoner having feloniously taken it away from that possession. (*k*)

Hammon's case. A banker's clerk informed a customer of [\*1224] the house that he had paid in money to his credit, and thereby induced the customer to give him a check for the amount, & received the money ; and then, to prevent a discovery, made fictitious entries, in the books. This was holden to be larceny.

A case of recent occurrence requires to be noticed in the same class. The prisoner was indicted for stealing two bank-notes of fifty pounds each, in the dwelling-house of the prosecutors. The facts given in evidence were, in substance, that the prisoner was a clerk in the banking-house of the prosecutors, and was intimate with a gentleman \*named Vale, whom he had induced to open his cash account at the house. On the 19th December, 1811, he made a fictitious entry in the banking book of Mr. Vale, to his credit, for two hundred pounds ; which sum he told Mr. Vale that he had that morning paid in on Mr. Vale's account. On the belief that this false entry and false assertion were true, Mr. Vale, on the 10th January, 1812, gave him a check on the prosecutors, dated, by the prisoner's desire, on the day before, for one hundred pounds ; for payment of which the prisoner, under colour of serving at the counter, took out of the prosecutors' bank-note drawer, in the shop, the two notes stated in the indictment, depositing the check among the other paid checks of the day, and making in the waste-book an entry of such payment. By this contrivance, and other previous practices of the like kind, Mr. Vale's real balance was turned against him to the amount of several hundred pounds : and, in order to prevent the discovery which must have immediately ensued if the accounts had been suffered to continue in this state, the prisoner made other false entries, to the credit of Mr. Vale, in the ledger of the house. Upon these facts the jury found the prisoner guilty ; and they also found that at the time he made the false entries in the ledger, and in the customers' book, he did it fraudulently, with the design of enabling himself to get the money of the prosecutors. The question whether the offence was a felony, or amounted only to a fraud, was afterwards submitted to the consideration of the twelve Judges : and they all held that the offence was larceny ; and that the prisoner had been rightly convicted of the charge as laid in the indictment. Lord Ellenborough, C. J. said, " Whether a man opens the drawer at once, and takes the money out, or whether he uses a circuit of contrivance, in order to conceal the act, it is all the same. Vale was either very imprudent, or very fraudulent, to let another man keep cash in his account, and to have what may be called a rider on his own account.

*k* Uniphase's case, *cor.* Heath, J. O. B. 1795. 2 Leach 699. 2 East. P. C. c. 16. s. 15. p. 567. The prisoner was, accordingly, convicted, and sentenced to be transported for seven years.

This is *fraudulenta contrectatio alienæ rei invito domino*; every part of the definition is satisfied; the entry the prisoner \*relies on, as making it the act of the house, is his own act. It is only a foolish shuffle to escape detection: he gains nothing but time by it: he takes it out with the right hand, and pays it to the left." Afterwards Grose, J., in delivering the opinion of the Judges, said, "The true meaning of larceny is the felonious taking the property of another without his consent, and against his will, with intent to convert it to the use of the taker. (l) The facts of the case answer every part of this definition. The taking of the property is clear; and that it was taken against the will of the owner, and with a felonious intent, is equally clear, from the circumstance of the prisoner's having fraudulently made these *false entries* with a view to conceal the means he had artfully made use of to obtain it." (m) [\*1225]

By the cases which have been now cited the maxim of the common law, already mentioned, relating to the fraudulent conversion by a servant to his own use of the goods of his master, appears to be sufficiently explained and established. But it should be observed that in all these cases it was considered that the property stolen was sufficiently received into the possession of the master before the taking by the servant. And this leads to the consideration of a material distinction respecting the possession of the master, namely, that the property will not be considered as sufficiently received into his possession, where it has merely been delivered to the servant for the master's use. Upon which subject it is well laid down that "if the servant have done no act to determine his original, lawful, and exclusive possession, as by depositing the goods in his master's house, or the like, although to many purposes, and as against third persons, this is in law a receipt of the goods by the master, yet it has been ruled otherwise in respect of the servant himself, upon a charge of larceny at common \*law, in converting such goods to his own use." (n) The ground of which doctrine appears to be that in such case there can be no tortious taking in the first instance, and consequently no trespass: and we have seen that without a trespass there can be no larceny. (o)

Upon this principle, in a case prior to the statute 15 G. II. c. 13. s. 12., (p) where it appeared upon an indictment for stealing East India bonds, the property of the governor and company of the Bank of England, that the bonds in question, having been taken to the bank for the purpose of being deposited there, were not carried to the usual place for such deposits, namely, a chest in the cellar of the bank, but were received by the prisoner, who was a cashier there, and placed

In the foregoing cases the property stolen was received into the possession of the master before the taking by the servant. But property is not sufficiently received into the master's possession, where it has merely been delivered to the servant for the master's use; &c. is not guilty of larceny. [\*1226]

Waite's case. Before the 15 Geo. II. c. 13. s. 12. it was holden that a cashier of the Bank of England, to whom a

l *Ante*, 1033.

m *Hannion's case*, O. B. Feb. 1312, and May. 1312. 2 Leach 1083. S. C. 4 Taunt. 304.

n 2 East. P. C. c. 16. s. 16. p. 568.

o *Ante*, 1034.

p *Post*, Chap. XVII.

bond was delivered, &c. not guilty of felony in converting it to his own use, &c.

**Bull's case.** The prisoner, who was a servant attending the shop, received some money from a customer, which he did not put into the till, but purloined; and it was holden not to be larceny; the money not having been in the possession of the master.

**Bazeley's case.** A banker's clerk, who was entrusted to receive bank-notes and money at the counter, instead of putting a note into the proper drawer, secreted it,

by him in his own desk, it was ruled that the prisoner was not guilty of larceny, in afterwards selling the bonds, and putting the money into his own pocket. And the ground of the decision appears to have been that as the bonds were never put into the cellar, in the usual course, the governor and company of the bank had no possession of them, but the possession remained always in the prisoner. (*q*)

In another case, where the prisoner was indicted for stealing a half crown and three shillings, the property of his master, the same principle was recognized. The master of the prisoner was a confectioner; and the prisoner was his servant, employed to attend the shop. The master, having some suspicion that the prisoner had occasionally purloined the money paid by persons dealing at the shop, procured a customer to come there, on pretence of buying something, having \*previously given to such customer some marked silver of his own. The customer accordingly came to the shop, in the absence of the master, and bought some articles of the prisoner, paying for them with the marked silver. Soon afterwards the master (who was waiting for the purpose) came in and examined the till, in which the prisoner ought to have deposited the silver when it was received; and finding only some of the marked silver there, he procured the prisoner to be immediately apprehended and searched, when the rest of the marked money was found upon him. The jury found the prisoner guilty; but the point being saved for the consideration of the twelve Judges, they were of opinion that the prisoner was not guilty of larceny, but only of a breach of trust; the money never having been put into the till, and, therefore, not having been in the possession of the master, as against the prisoner. (*r*)

Both these cases were much relied upon, in a subsequent case, on behalf of the prisoner, a banker's clerk, who was indicted for stealing a bank-note of the value of one hundred pounds, the property of the bankers. The evidence was, in substance, that a gentleman, who kept cash with the bankers, sent, by his servant, the one hundred pound bank-note in question, together with twenty-two pounds in other bank-notes, and fifteen pounds in money; and that the servant delivered the whole into the hands of the prisoner. The prisoner, in his capacity of clerk to the bankers, was *authorized to receive and give a discharge for the same*; and it was his duty to put the money received into a till, and to place in another drawer the several bank-notes, which he might receive during the

*q* Waite's case, *cor.* Carter and Dennison, Js. O. B. 1743. 1 Leach 28. 2 East. P. C. c. 16. s. 17. p. 570. Dennison, J. said, that though this might be such a possession in the bank whereon they might maintain a civil action, yet there was a great difference between such

a possession and a possession whereon to found a criminal prosecution.

*r* Bull's case, *cor.* Heath, J. O. B. Jan. 1797; Hil. Term, 1797, cited in Bazeley's case, 2 Leach 841. 2 East. P. C. c. 16. s. 17. p. 572.

day, for the purpose of another clerk taking down and entering in a book the particular description of each note. The prisoner gave an acknowledgment to the servant of having received the full sum of one hundred \*and thirty-seven pounds, and put the money into the till; but instead of placing the remaining sum of one hundred and twenty-two pounds, which he received in bank-notes, into the drawer, according to his duty, he kept back the one hundred pound note in question, and only delivered over those to the amount of twenty-two pounds. The jury found the prisoner guilty, subject to the opinion of the Judges, whether the taking could be considered as felonious, or only as a breach of trust? When the case came to be argued, an additional fact was stated and admitted, namely, that the prisoner had given his employers security to account for what he received and against embezzlements. The case was argued at considerable length before nine of the Judges, who, at first, entertained some doubt on the case, but ultimately agreed that it was not felony; inasmuch as the note was never in the possession of the bankers, distinct from the possession of the prisoner; but that it would have been otherwise if the prisoner had deposited it in the drawer, and had taken it afterwards. (s)

and converted it to his own use: and [\*1228] this was holden to be only a breach of trust, and not larceny; the note never having been in the banker's possession.

In consequence of this decision (of which however it should be observed, that it was perfectly in unison with the due administration of criminal justice, in adopting the merciful construction of a doubtful point of law) the legislature thought it necessary forthwith to make some provisions for the better protection of masters against embezzlements by their clerks and servants; many of whom, employed in commercial transactions, are unavoidably entrusted with the receipt of monies to a large amount. They accordingly passed the statute 39 Geo. III. c. 85. which relates to such embezzlements, and will be considered in the succeeding Chapter.

In consequence of the foregoing decision the 39 Geo. III. c. 85. was passed, for protecting masters from the embezzlements of their clerks and servants.

## \*CHAPTER THE FIFTEENTH.

[\*1229]

### *Of Embezzlement by Servants, Clerks, Bankers. Brokers. and other Agents.*

THE statute 39 Geo. III. c. 85., passed upon the occasion which has been just noticed, (a) recites that bankers, merchants and others, are, in the course of their dealings and transactions, frequently obliged to entrust their servants.

39 Geo. III. c. 85.

\* Bazeley's case, O. B. 1799. East. T. 1799.  
2 Leach 835. 2 East. P. C. c. 16. s. 17. p. 571.

a Ante. 1220



Servants or clerks receiving any money or other effects on their master's account, and fraudulently embezzling or secreting [\*1230] any part thereof, shall be deemed to have feloniously stolen the same; and they, their abettors, &c. shall be liable to be transported for 14 years.

Construction of the statute.  
Larceny.

Whittingham's case.  
The statute

clerks and persons employed by them in the like capacity, with receiving, paying, negotiating, exchanging or transferring money, goods, bonds, bills, notes, banker's drafts, and other valuable effects and securities; and that doubts had been entertained whether the embezzling of the same by such servants, clerks and others, so employed by their masters, amounted to felony by the law of England; and that it was expedient that such offences should be punished in the same manner in both parts of the united kingdom: and the statute then enacts, "that if any servant or clerk, or any person employed for the purpose in the capacity of a servant or clerk, to any person or persons whomsoever, or to any body corporate or politic, shall, by virtue of such employment, receive or take into his possession any money, goods, bond, bill, note, bankers' draft, or other valuable security or effects, for or in the name or on the account of his master or masters, or employer or employers, and shall fraudulently embezzle, secrete or make away with the same, or any part thereof, every such offender shall be deemed to have feloniously stolen the same from his master or masters, employer or \*employers, for whose use, or in whose name or names, or on whose account the same was or were delivered to or taken into the possession of such servant, clerk or other person so employed, although such money, goods, bond, bill, note, bankers' draft or other valuable security, was or were no otherwise received into the possession (b) of his or their servant, clerk or other person so employed; and every such offender, his adviser, procurer, aider or abettor, being thereof lawfully convicted or attainted, shall be liable to be transported to such parts beyond the seas as his majesty by and with the advice of his privy council shall appoint for any term not exceeding fourteen years, in the discretion of the court before whom such offender shall be convicted or adjudged."

The effect of this statute is to constitute the offence described in it a larceny. It specifies what the circumstances are which shall be sufficient to constitute such offence a larceny, and under which circumstances the offender shall be deemed to have *feloniously stolen*. "First, he must be a servant or clerk, &c.; then he must receive or take into his possession the money, goods, &c.: and that must be for or on account of his master: and he must fraudulently embezzle the same." (c)

Shortly after this act was passed, it was ruled, that it was an offence within its provisions for a servant to embezzle mo-

b Mr. East states that, by some blunder in the fair copy taken from the original draft of the act, a line has been omitted in this place, which was in the original draft prepared by himself, namely, "of such master or masters, employer or employers, than by the actual

possession." And the line is inserted in 51 Geo. III. c. 38. by which provision is made with respect to similar offences committed in *Ireland*.

c By Lord Ellenborough, C. J. in *Rex v. Johnson*, 3 M. and S. 548, 549

ney received from a customer of his master's, though the money had been given to the customer by the master in \*order that it might be paid in the course of business to the servant, for the purpose of trying the servant's honesty. The indictment charged the prisoner as a servant of one John Gregory, with receiving the sum of seven shillings from one Hannah Morris, for and on account of his master, and afterwards feloniously embezzling the same. On the evidence it appeared that Gregory, who was a potatoe-merchant, having reason to suspect the prisoner of dishonesty, procured Hannah Morris to come to his shop with a marked seven-shilling piece of his own money, there to purchase potatoes, and pay for them with the seven shilling-piece. She came accordingly, bought potatoes to the amount of one shilling and three pence, and paid the marked seven-shilling piece to the prisoner, who gave her out of his own pocket five shillings and nine pence in change, though he might have given the change out of monies belonging to his master which had been left in the counting-house for that purpose. The seven-shilling piece was afterwards found secreted in the prisoner's box. Upon this evidence it was contended, on behalf of the prisoner, that the case was not within the act; and that the act applied only to cases where the monies had been paid to the servant by other persons than the master, and not, as in this case, where the monies had come intermediately from the hand of the master: but the court was perfectly satisfied that there was nothing in the objection; and that if a servant receive the money, either from the master, or from a third person on the master's account, it is sufficient. (*d*)

applies to a  
[\*1231]  
servant  
who em-  
bezzles mo-  
ney receiv-  
ed from a  
customer to  
whom his  
master had  
given it for  
the purpose  
of trying  
the ser-  
vant's ho-  
nesty.

The same objection was, however, again taken in a case which occurred some years afterwards, and was submitted to the consideration of the twelve Judges, who were of opinion, that it was not well founded. The prisoner was indicted for embezzling three shillings, the property of his masters, James Clarke and John Gyles. The evidence was, \*in substance, that Messrs. Clarke and Gyles, whom the prisoner served in the capacity of shopman, having reason to suspect that he embezzled some of the monies received by him in the shop, one of them, Mr. Gyles, on the day mentioned in the indictment, formed a plan for detecting him. In pursuance of it, he first took an account of the money at that time in the till, and marked it; and then went to the house of a neighbour where he took three shillings from his pocket, marked them also, and then gave them to his neighbour's servant, one Frances Moxon, who by his desire, and also by the order of her mistress, went with them to the shop of Messrs. Clarke and Gyles, and purchased of the prisoner, who was then serv-

Headge's  
case.  
In this case  
it was de-  
cided by  
the twelve  
Judges,  
[\*1232]  
that a ser-  
vant se-  
creting mo-  
ney which  
the master  
had mark-  
ed and sent  
by a person  
to be used  
in making  
a purchase  
at his shop,  
with a view  
of trying  
the hones-  
ty of the

*d* Whittingham's case, O. B. 1801, 2 Leach 412. But the prisoner was acquitted upon another objection. See post. 1236.

servant,  
commits an  
offence  
within the  
statute.

ing in the shop, articles exactly amounting to three shillings, and paid for them with the three shillings given her by Mr. Gyles. It was clearly proved that the prisoner embezzled these three shillings. Upon this evidence it was submitted to the court, on the behalf of the prisoner, that as the three marked shillings were the property of the prosecutors, and had been taken out of Mr. Gyles's own pocket for the sole purpose of trying the fidelity of the prisoner, the delivery of them to Frances Moxon had not changed the possession of them, which, it was contended, remained constructively with the prosecutors up to the moment when the embezzlement took place; and therefore that the charge should have been for a larceny at common law, and not for an embezzlement under the statute. The court overruled the objection; but, upon the prisoner being found guilty, saved the point for the consideration of the twelve Judges; who were of opinion, that the case was clearly within the statute, and the conviction proper. Grose, J. who delivered their opinion, referred to Bull's case, (*e*) as in point; and said, that from that case it appeared that the present, which was precisely similar in its circumstances, was not a case of larceny at common law, but a breach of trust, and as such within the terms and operation of the statute. (*f*)

[\*1233]

Peck's  
case. Ruled  
that a case  
was not  
within this  
statute  
where the  
property  
taken was  
delivered  
to the ser-  
vant by his  
master.

\*But where the property taken was delivered to the servant by the master himself, it was ruled that the case was not within this statute. The indictment charged the prisoner with having received and taken into his possession one shilling on account of his master, and embezzling the same; and upon the evidence it appeared, that having two shillings and sixpence of his master's money, to pay on account of his master, he only paid one shilling and sixpence, and converted the other shilling to his own use; upon which the learned Judge directed the jury to acquit the prisoner. (*g*)

Johnson's  
case.  
Counts for  
larceny at  
common  
law and for  
embezzle-  
ment under  
the statute  
may be  
joined in  
the same  
indictment.

In a case where the prisoner had been convicted at the assizes and adjudged to be transported for fourteen years upon an indictment, several counts of which charged him with embezzling bank-notes against the form of the statute, and others with stealing bank-notes in the common form of counts for larceny, it was assigned for error that this was a misjoinder, the counts for embezzlement on the statute and the counts for grand larceny being counts upon which a different judgment ought by law to be given. But the court of King's Bench were of opinion that the counts for embezzlement might well be joined with the counts for larceny, considering that the statute had in fact made the offence of

*e* Ante, 1226.

*f* Headge's case. O. B. 1809. 2 Leach 1033.

*g* Peck's case. cor. Park. J. Stafford Sum.

Ass. 1817, MS. But it is usual in indictments upon this statute to add a count for larceny at common law.

embezzlement described in it a larceny; and that, having so done, it had attached upon it all the properties and consequences attaching upon the crime of larceny. And Lord Ellenborough, C. J. said, "If this were an offence of a perfectly different nature, I should have been of opinion that the judgment could not have been sustained. But the act says, that the offender shall be deemed to have feloniously stolen, which is expressly constituting it a felony, and having so done, the offender must, as in the like cases of felony, pray the benefit of clergy. But inasmuch as it is larceny, and therefore liable only to the \*punishment of seven years' transportation, this act goes farther, and gives power to transport for fourteen years. The act does not alter the quality of the offence; he is to be deemed a felon, and as such must pray the benefit of clergy, just the same as if this enactment for an extended term of transportation had not been found in the statute. It makes no alteration in the judgment; the judgment is to pass against him as a felon; if he does not pray the benefit of clergy, it must be a judgment of death. And in a variety of cases, though the punishment be different, yet counts may be joined." And he further added, "Here I think it does not appear that there is a misjoinder; because both are clergyable felonies; and the defendant is liable to the punishment incident to such a felony with an extension of it to the term of fourteen years." (h) [\*1234]

It appears that an indictment upon this statute must contain all the requisites of an indictment for larceny at common law: and an indictment was holden to be defective, because it did not expressly aver that the money alleged to have been feloniously stolen taken and carried away by the prisoner was the money of any particular person. The point was reserved for the opinion of the Judges, and was argued before them at considerable length. It was contended, on behalf of the prisoner, in support of the objection, that as the statute has not made the sort of embezzlement therein mentioned eo nomine a distinct and substantive felony, but has only enacted, that the property received into the possession of the servant, and feloniously converted by him, shall be considered as having been by such conversion feloniously taken from the possession of the master, the offence still continues a common law larceny; and that consequently an indictment framed upon the statute must contain all the requisites of an indictment for larceny at common law. And in order to shew that it would not be a sufficient \*answer to the objection, to say that the indictment had followed the words of the statute, several instances were mentioned of indictments upon particular statutes, 1 Edw. VI. McGregor's case. As the statute makes the offence a larceny, the indictment should contain all the requisites of an indictment for larceny at common law. [\*1235]

c. 12. s. 10. 8 Eliz. c. 4. 22 Car. II. c. 5. 3 and 4 W. & M. c. 9. s. 1. 10 and 11 W. & M. c. 23. s. 1. 12 Ann. c. 7. and 24 Geo. c. II. 45. relating to the stealing of particular goods, or stealing goods under certain circumstances, all of which pursue the same form as to the requisite parts of larceny at common law. On the part of the crown it was argued, that the statute in question made the embezzling by servants, in the manner stated, a substantive felony, which before was only a misdemeanor, or breach of trust, for which the master had a civil remedy. That it was therefore sufficient to follow the words of the act, as in other instances where new offences were created; which differed from indictments on statutes merely ousting the offender from clergy in cases which were before larcenies at common law. That the legislature, in this instance, meant to include cases where, from the property being as it were in transitu, it was difficult to ascertain in whom it was at the time of the offence committed; and that it therefore intended to relieve the prosecutor from the necessity of laying it to be in any particular person. That at any rate no technical form of words was necessary in charging a thing to be the property of another; and that here enough was stated, to shew that it was not the prisoner's own property, being charged to have been received by him on account of his masters; which was tantamount to an allegation of their having a special property in it. It appears that the Judges at first doubted much upon this case, but that ultimately a majority of them were of opinion that the indictment was defective, as it did not aver that the money alleged to have been stolen was the money of the prosecutors; that the statute made the offence a larceny, and made the possession of the servant, under such circumstances, the possession of the master. (i)

[\*1236]  
Statement  
of monies  
or bank-  
notes in the  
indictment.

\*A case is reported, where the prisoner being charged in the indictment with embezzling "the sum of *seven shillings*," and the evidence being, that only one shilling and three-pence had been received and not accounted for by him, the court is said to have ruled, that the evidence did not support the charge, and directed the jury to acquit the prisoner. (k) But this seems not to be consistent with the doctrine, that the offence under this statute is to be considered as a larceny, and the indictment framed accordingly; as, upon an indictment for larceny in stealing seven shillings, if it were proved that the party stole only one shilling and three pence, there can be no doubt that he might be convicted of stealing the shilling, and that the three pence might be

i M'Gregor's case, O. B. 1801. Feb. 1802.  
2 Leach 932. 3 Bos. and Pul. 106. 2 East.  
P. C. c. 16. s. 18. p. 576.

k Whittingham's case, O. B. 1801, before

Silvester, Com. Serjeant, 2 Leach 912. Qu. If  
the indictment was not for embezzling a seven  
shilling piece. See the case, *ante*, 1231.

put out of the question as not being property mentioned in the indictment. Nor is it supported by a more recent case, where the indictment charged the prisoner with embezzling “divers, to wit, nine bank notes for the payment of divers sums of money, amounting in the whole to a certain sum of money, to wit, the sum of nine pounds of lawful money of Great Britain, and of the value of nine pounds of like lawful money;” and upon an objection that this description was not sufficiently certain, Lord Ellenborough, C. J. said, “It has been argued as if the prosecutor was bound to prove the exact amount of the value and number laid, whereas, if he proved only one bank-note of the value of 1*l.* it would be sufficient to maintain the charge.” (*l*) But if the property embezzled consisted of bank notes, it will not be sufficient to charge in the indictment an embezzlement of the “pounds” merely to which the bank notes amounted in value: as in a case where the prisoner was indicted for embezzling “nineteen pounds,” the property of his master, and it appeared in evidence that the nineteen pounds embezzled were all received by him in \*notes of the Bank of England; it was holden, that as the [\*1237] statute mentions specifically the different kinds of property, the embezzlement of which is declared to be larceny, and amongst the rest, notes, it was not sufficient to describe notes as “pounds,” which must be taken *primâ facie* to mean money. And the prisoner was accordingly acquitted. (*m*)

The usual form in the beginning of the indictment has been to state, “that A. B. late of &c. on &c. at &c. was clerk to C. D. and the said A. B. being such clerk as aforesaid did then and there by virtue of his said employment as such clerk as aforesaid, &c.” (*n*) but in a late publication, containing many useful precedents, the form is given with an addition, “that A. B. late of &c. on &c. at &c. was clerk to C. D. and employed and entrusted by the said C. D. to receive money for him, and being such clerk so employed and entrusted as aforesaid then and there by virtue of such employment and entrustment as aforesaid he the said A. B. did &c.” And the reasons given for the insertion of these words are, that they are contained in the preamble of the statute, and referred to by the words “such employment;” and that an indictment had been recently quashed for the want of them. (*o*)

Where the indictment charged that the prisoner was employed as a clerk to A. and that, by virtue of his employ- Where the word “fe-

*l* Rex v. Johnson, 3 M. and S. 548. And see ante, Chap. on Larceny, 1148. and 2 Stark. Crim. Plead. 428, *et sequ.*

*m* Lindsey's case, *cor.* Park, J. and Abbott, J., O. B. July 1817, MS. And it is understood, that Furneaux's case, considered by the twelve Judges in June 1817, was to the same effect. MS.

*n* Cro. Circ. Comp. 180. 2 Stark. Crim. Plead. 428.

*o* 3 Chit. Crim. L. 982. note (*m*) Possibly the case referred to is Rex v. Gilbert, *cor.* Silvester, Recorder, O. B. May, 1810, where the indictment was holden bad because it did not aver that the prisoner *was entrusted to receive money*; and the prisoner was in consequence discharged, MS



feloniously" was omitted before [\*1238] the word "embezzled," but the conclusion was, that the prisoner "feloniously did steal, take, &c." the indictment was holden good.

Trial. County in which the offence may be committed.

Hobson's case.

A denial by a servant, when in the county of Stafford, of his having received money in the county of Salop, was holden to be evidence to shew that the receipt in the county of Salop was with intent to em- [\*1239] bezzle within the statute; and therefore it was also holden that the trial was properly had in the county of Salop.

ment, he received from B., on account of his master, 9*l.* 18*s.* 9*d.* without shewing of what monies that sum was made up, and that he fraudulently embezzled and secreted \*the same, omitting the word *feloniously*; and so it concluded that the jurors say that he did "*feloniously* embezzle, steal, take, and carry away. &c.;" objection was made, that in the introductory part of the indictment it was not alleged that he did feloniously embezzle, &c. and that therefore the indictment failed to shew that he had committed a felony, and that, unless it was so shewn in the body of the indictment, it was not enough that it was so alleged in the conclusion of it. The Judges, however, considered it to be sufficient that it was stated in the conclusion; and the indictment was holden good. (p)

Two cases have occurred, in which questions have been raised as to the *county* in which the offence within the statute might be considered as having been so completed as to authorize a trial in such county.

In the first of these cases the prisoner was indicted at Shrewsbury, in the county of Salop. It appeared, on the trial, that the residence of the master was at Litchfield, in Staffordshire, where the prisoner served him in his trade. That on a Saturday morning, both of them were at Shrewsbury; and that the master, having authorized a person, named Beaumont, to collect some debts for him at that place, returned home the same morning, leaving the prisoner at Shrewsbury to receive the money from Beaumont, and bring it to him at Litchfield the same night. The prisoner received the money from Beaumont about noon, and also a letter for his master, which had been left at Beaumont's, but which did not relate to the money transaction. He left Shrewsbury soon after, but did not go to his master at Litchfield till the following evening. He then delivered the letter; and being asked about the money, he said he had not received any. A few days after, the master, in consequence \*of information he had received by letter, charged the prisoner with having received the money, and another servant who had been at Shrewsbury on the Saturday, being present, told the prisoner that he had seen him receive money, but the prisoner persisted in denying that he had received any. Some time afterwards, the master, having received further intelligence, bid the prisoner go to Shrewsbury to clear himself. On the Saturday following the prisoner went to Beaumont, at his house in Shrewsbury, and desired him to make a search on the left-hand side of the room in which they had been; but no search was made,

p Rex v. John Crighton, cor. Thomson, B. Lancaster Sum. Ass. 1803, and before the Judges at Serjeants' Inn, Nov. 1803, MS. and

as cited by Bayley, J. in Rex v. Johnson 3 M. and S. 555.

Beaumont telling him it was of no use to search, as he had received the money from him. The jury having found the prisoner guilty, the case was submitted to the consideration of the twelve Judges, upon two questions; first, Whether, under this statute, an indictment might not be found and tried in the county where the money or goods were received, although there were no evidence of any other fact locally arising within the same county? and, secondly, Whether, if further local proof were necessary, the subsequent conduct of the prisoner at Shrewsbury were not sufficient to obviate the objection, as being an act in furtherance of the purpose of secreting or embezzling? The Judges were of opinion, that the trial was properly had at Shrewsbury: "Most of them thought, that as in the case of larceny at common law, so in this, where the statute declared the offence to be of the same kind, the subsequent conduct of the prisoner, in not accounting to his master and denying the receipt of the money, was evidence to shew that the original taking was with intent to secrete and embezzle, and so to steal, within the meaning of the statute; and the more so, as the act of secreting was a negative act. And some considered that the offence was triable in either county, as referable to the original taking in the one, and the not accounting, but denying the receipt when called upon, in the other." (q)

\*In the other case which occurred shortly afterwards, the indictment charged the prisoner, with embezzling the sum of ten shillings, the property of his master James Barker. The evidence was, that the prosecutor Barker, who was a fishmonger in Drury-lane, in the county of Middlesex, sent his servant the prisoner, with some herrings, to a street in Blackfriars-road, in the county of Surry, to a Mrs. Stevens; telling him that he was to receive the sum of ten shillings for them. He went with the herrings about six o'clock in the evening, and delivered them to Mrs. Stevens, who paid him the ten shillings; after which he returned to his master, who asked him if he had brought the money; to which he replied, that he had not, for that Mrs. Stevens had not paid him. His master then paid him his weekly wages (it being on a Saturday), and he went away, being to return on Monday morning as usual: but did not return, nor did he ever account for the money. Upon this evidence it was contended, on the part of the prisoner, that he was only liable to be indicted in the county of Surry, where the money was received: and the jury having found him guilty, this point was reserved for the consideration of the Judges. The opinion of the Judges was afterwards deli-

[\*1240]

Taylor's case.

In this case it was holden that if a servant receive money for his master in the county of A., and being called upon to account for it in the county of B. there deny the receipt of it, he may be indicted for the embezzlement in the latter county.

q Hobson's case, *Shrewsbury* Lent Ass. dend. xxi. 1803. and East. T. 1803 1 East. P. C. Ad-

vered by Lord Alvanley, C. J. who first referred to the foregoing case of Hobson, and then proceeded.—“In the present case no doubt can be entertained. The prisoner, being sent over Blackfriars-bridge into the county of Surry, there received ten shillings for his master. The receipt of that money was perfectly legal, and there was no evidence that he ever came to the determination of appropriating the money to his own use until after he had returned into the county of Middlesex. It was not proved that the money ever was embezzled until the prisoner was in the county of Middlesex. In cases of this sort the nature of the thing embezzled ought not to be laid out of the question. The receipt of money is not like the receipt of an individual thing, where the receipt may be attended with circumstances which plainly indicate an intention to steal, by shewing an intention in the receiver

[\*1241] \*to appropriate the thing to his own use. Thus, if a servant receive a horse for his master, and sell it before he gets out of the county where he first received it, it might be said that he is guilty of the whole offence in that county. But with respect to money, it is not necessary that the servant should deliver over to his master the identical pieces of money which he receives, if he should have lawful occasion to pay them away. In such a case as this therefore, even if there had been evidence of the prisoner having spent the money on the other side of Blackfriar's-bridge, it would not necessarily confine the trial of the offence to the county of Surry. But here there is no evidence of any act to bring the prisoner within the statute until he is called upon by his master to account. When called upon by his master to account for the money, the prisoner denied that he had ever received it. This was the first act from which the jury could with certainty say that the prisoner intended to embezzle the money. In this case there was no evidence of the prisoner having done any act to embezzle in the county of Surrey, nor could the offence be complete, nor the prisoner be guilty within the act, until he refused to account to his master. We are therefore of opinion, that the prisoner was properly indicted in the county of Middlesex.” (r)

As to the prosecutor being put to his election where the transaction consists of distinct acts of embezzlement.

[\*1242] The offence under the statute being constituted a felony, with the attendant properties and consequences which attach upon a crime of that degree, (s) it follows that though the same act may be charged as a different offence in different counts of the indictment, yet different acts amounting to different and distinct felonies ought not regularly to be included in the same indictment, and will probably not be allowed to be given in evidence by the court, who may in their discretion put the prosecutor to elect on which he will \*pro-

ceed. (t) And it seems, that each distinct act of embezzlement will in general be a distinct felony.

In a case where the indictment against the prisoner contained a variety of counts, some for embezzlement under the statute, and others for larceny at common law, the following facts appeared upon the statement of the counsel for the prosecution. The prisoner had been for several years the principal clerk to the prosecutors, who were engaged in a large iron manufactory, and in that capacity had the principal direction of the concern, receiving monies, paying workmen, and other expences, and being empowered to draw upon the bankers of the prosecutors for such money as he might require for those purposes, and to draw and endorse bills of exchange in the prosecutors' names. At the end of every quarter of a year, during the time he had so acted as clerk, he had laid before the prosecutors an account containing a statement of the receipt and expenditure of the monies which had come to his hands, at the bottom of which there had always appeared a balance stated as due to the prosecutors. During the first year that any property was embezzled, this balance was of small amount; but it had gradually increased; and in the latter part of the prisoner's service, the balance of each quarter's account, which should have been in his hands, had amounted to several thousand pounds. The prosecutors, having great confidence in the prisoner's integrity, never enquired particularly as to the \*nature of this balance, or of what cash, cash-notes, or bills of exchange it from time to time consisted, but had supposed that it probably consisted of long dated bills. About the end of the last quarter of his service circumstances occurred which induced the prosecutors to suspect his honesty; and an enquiry was in consequence instituted, from which, and his own admissions, it clearly appeared that monies belonging to the prosecutors, nearly to the amount of the balance which appeared upon the prisoner's accounts in their favour, had been appropriated by him to his own use. He admitted that he had for a long time been in the practice of appropriating to his own use some of the monies received by him on account of the prosecutors, and drawn from their bankers, under his authority to draw upon them for the payment of the workmen and the other purposes of the manufactory. But he did not state any specific sum that he had so converted, nor of what particular kinds of cash or notes any part of the embezzled property consisted; but

Hebb's case. If the transaction proposed to be given in evidence appears to consist of several distinct acts of embezzlement, the prosecutor may be put to his election of some particular act on which he will proceed. And if he cannot shew some particular act of embezzlement, the indictment will [\*1243] not be supported.

(t) The rule is thus laid down by Buller, J. in the case of Young and others, 3 T. R. 106.: "If it appear before the defendant has pleaded, or the jury are charged, that he is to be tried for separate offences, it has been the practice for Judges to quash the indictment, lest it should confound the prisoner in his defence, or prejudice him in his challenge of the

jury; for he might object to a jurymen's trying one of the offences though he might have no reason to do so in the other. But these are only matters of prudence and discretion. If the Judge who tries the prisoner does not discover it in time I think he may put the prosecutor to make his election on which charge he will proceed."

said for the last two or three years he had been in the constant practice of taking money, in sums which he did not recollect, and not particularly at any one time; and that he had continued the practice, subsequently to the last quarter, at which he rendered an account, up to the day of his detection. The counsel for the prosecution then stated, that though he considered himself precluded from giving evidence of any embezzlement prior to the last quarter's account which the prisoner had laid before the prosecutors, inasmuch as that account had been looked at by them without any objection being made on their part to the balance; yet he was prepared to support the indictment, by proving the receipt of various sums by the prisoner on account of the prosecutors subsequent to the last quarter's account, by the admission of the prisoner that the same system and practice of converting the monies of the prosecutors to his own use had been continued by him from the time the last quarterly account was made up to the time of his detection, and by shewing that, upon the prisoner's account books being seized, there appeared upon [\*1244] the face of them an amount of monies received \*considerably beyond the amount of monies expended during that time: and that upon this evidence he conceived that he might ask the jury to presume that the prisoner had embezzled some note, or sum of money, within the description contained in the indictment; the several counts of which were so framed as to include almost every possible sum, either in notes, bills, or cash, which the prisoner could have taken at any one time. But he was here stopped by Mr. Baron Garrow, who enquired whether he was able to give evidence of any particular sum having been so converted, and of what particular description of notes, bills, or cash it consisted; and upon being answered that the evidence would not go beyond that which had been already stated, the learned Judge said, he was clearly of opinion, that the indictment could not be supported. He said that the evidence stated would only go to shew a conversion by the prisoner of the monies of the prosecutors, consisting probably of numerous distinct acts of embezzlement, all of which were distinct felonies, and, if ascertained, might be made the subject of distinct prosecutions: but that it was necessary they should be so ascertained and distinguished, and that the prosecutors should select some one act of embezzlement, in support of the present indictment; the rule of law being, that where a transaction proposed to be given in evidence appears clearly to consist of several distinct felonies the prosecutor ought to be put to elect some particular felony on which he will proceed. And he accordingly directed the jury to acquit the prisoner. (u)

" Hebb's (Richard Astley) case, *cor.* Garrow, B. *Stafford* Sum. Ass. 1818. MS.

The statute, in mentioning the specific punishment of transportation for fourteen years, does not exclude any other punishment of inferior degree. (w) For “when the statute declares that the offender under the circumstances shall be deemed to have feloniously stolen, it makes the \*offence a felony, and imposes all the common and ordinary consequences attending a felony. Therefore, as in other cases of grand larceny the party convict will be liable to judgment of death unless he pray the benefit of clergy, so it is the same in this case. Some of the ordinary consequences of a conviction of grand larceny have been shewn to follow a conviction under this act; for although the act gives no power to fine or imprison, the common law punishments, still it is the practice to impose such punishments; and the court is not confined to the specific punishment of transportation for fourteen years mentioned in the act. The reason why the mention of such a punishment was introduced into the act is probably this, that the legislature meant the party convict should not only be liable to all the ordinary punishments attaching upon a conviction of a clergyable felony, but that he should also be liable to a greater term of transportation than in other cases of clergyable felonies.” (x)

Punishment for offences against this statute. Not necessarily [\*1245] fourteen years’ transportation.

But, in order to found a judgment upon the statute, the indictment must be specially drawn so as to bring the case within it. (y)

It may be observed with respect to embezzlements of their masters goods committed by clerks or servants in *Ireland*, the statute 51 Geo. III. c. 38. describing the offences in words nearly corresponding with those of the 39 Geo. III. c. 85. enacts that the offender shall be deemed guilty of a *misdemeanor*, and be liable to be transported for fourteen years.

51 Geo. III. 38. As to similar embezzlements in Ireland.

Shortly after the decision in Walsh’s case, which has been noticed in a former part of this work. (z) an act was passed, for the more effectually preventing the embezzlement \*of securities for money and other effects, left or deposited for safe custody or other special purpose, in the hands of bankers, merchants, brokers, attornies, or other agents.

Of embezzlements by bankers, merchants, [\*1246] brokers, attornies, or other agents.

This statute is the 52 Geo. III. c. 63.; the first section of which recites, that it was expedient that due provision should be made to prevent the embezzlement of government and other securities for money, plate, jewels, and other personal effects, deposited for safe custody, or for any special purpose, with bankers, merchants, brokers, attornies, and

52 Geo. III. c. 63. If any person with whom as banker, broker, agent, &c. any securi-

w 2 East. P. C. c. 16. s. 13. p. 578.

x By Bayley, J. in *Rex v. Johnson*, 3 M. and S. 556.

y Jones’s case, *Winton*, Spr. Ass. 1800. 2 East. P. C. c. 16. s. 18. p. 576.

z *Ante*. 1066.



ties or personal effects shall have been deposited without authority to sell or pledge the same, shall sell, negotiate, pledge, embezzle, &c. the same, in violation of good faith, with intent to defraud, such offender shall be deemed guilty of a misdemeanor, and be transported for fourteen years, or receive such other punishment as may be [\*1247] inflicted for a misdemeanor.

other agents, entrusted by their customers and employers : and then enacts, “ that if any person or persons with whom (as banker or bankers, merchant or merchants, broker or brokers, attorney or attornies, or agent or agents of any description whatsoever) any ordnance debenture, exchequer bill, navy victualling or transport bill, or other bill, warrant or order for the payment of money, state lottery ticket or certificate, seaman’s ticket, bank receipt for payment of any loan, India bond or other bond, or any deed, note or other security for money, or for any share or interest in any national stock or fund of this or any other country, or in the stock or fund of any corporation, company or society established by act of parliament or royal charter, or any power of attorney for the sale or transfer of any such stock or fund or any share or interest therein, or any plate, jewels or other personal effects, shall have been deposited, or shall be or remain for safe custody, or upon or for any special purpose, without any authority either general, special, conditional, or discretionary, to sell or pledge such debenture, bill, warrant, order, state lottery ticket, or certificate, seaman’s ticket, bank receipt, bond, deed, note or other security, plate, jewels or other personal effects, or to sell, transfer or pledge, the stock or fund, or share or interest in the stock or fund to which such security or power of attorney shall relate, shall sell, negotiate, transfer, assign, pledge, embezzle, secrete or in manner apply to his or their own use or benefit, any such \*debenture, bill, warrant, order, state lottery ticket, or certificate, seaman’s ticket, bank receipt, bond, deed, note or other security as herein before mentioned, plate, jewels or other personal effects, or the stock or fund, or share or interest in the stock or fund to which such security or power of attorney shall relate, in violation of good faith, and contrary to the special purpose for which the things hereinbefore mentioned, or any or either of them, shall have been deposited, or shall have been or remained with or in the hands of such person or persons, with intent to defraud the owner or owners of any such instrument or security, or the person or persons depositing the same, or the owner or owners of the stock or fund, share or interest, to which such security or power of attorney shall relate, every person so offending in any part of the united kingdom of Great Britain and Ireland, shall be deemed and taken to be guilty of a misdemeanor, and, being thereof convicted according to law, shall be sentenced to transportation for any term not exceeding fourteen years, or to receive such other punishment as may by law be inflicted on a person or persons guilty of a misdemeanor. and as the court before which

such offender or offenders may be tried and convicted shall adjudge." (a)

The second section of the statute recites that it is usual for persons having dealings with bankers, merchants, brokers, attornies, and other agents, to deposit, or place in the hands of such bankers, merchants, brokers, attornies, and other agents, sums of money, bills, notes, drafts, cheques, or orders for the payment of money, with directions, or orders, to invest the money so paid, or to which such bills, notes, drafts, cheques, or orders, relate, or part thereof, in the purchase of stocks, or funds, or in or upon government or other securities for money, or to apply and dispose thereof in other ways, or for other purposes; and that it was expedient \*to prevent embezzlement and malversation in such cases also: and it then enacts, "that if any such banker, merchant, broker, attorney, or other agent, in whose hands any sum or sums of money, bill, note, draft, cheque or order for the payment of any sum or sums of money shall be placed, with any order or orders in writing, and signed by the party or parties who shall so deposit or place the same, to invest such sum or sums of money, or the money to which such bill, note, draft, cheque or order as aforesaid shall relate, in the purchase of any stock or fund, or in or upon government or other securities, or in any other way or for any other purpose specified in such order or orders, shall in any manner apply to his or their own use and benefit, any such sum or sums of money, or any such bill, note, draft, cheque or order for the payment of any sum or sums of money as hereinbefore mentioned, in violation of good faith, and contrary to the special purpose specified in the direction or order in writing hereinbefore mentioned, with intent to defraud the owner or owners of any such sum or sums of money, or order for the payment of any sum or sums of money; every person so offending in any part of the united kingdom, shall, in like manner, be deemed and taken to be guilty of a misdemeanor, and being convicted thereof, according to law, shall incur and suffer such punishment as is hereinbefore mentioned."

52 Geo. III. c. 63. s. 2. If any such banker, broker, agent, &c. in whose hands any money, bill, &c. shall be placed with any order in writing, signed by [\*1248] the party, to invest such money, &c. shall apply to their own use any such money, &c. in violation of good faith, with intent to defraud the owner of such money, &c. such offenders shall be guilty of a misdemeanor, and punished as mentioned in the former section.

The statute then proceeds to provide that nothing therein shall extend to prevent any of the persons, thereinbefore mentioned, from receiving any money actually due and payable upon or by virtue of any of the instruments or securities mentioned in the act, according to the tenor and effect thereof. (b) And that the penalties of it shall not extend to any partner or person belonging to a firm, unless he shall actually commit, or be accessory or privy to the com-

Limitations contained in this statute.

<sup>a</sup> See an indictment on this section of the statute, against a bill-broker for embezzling

a bill delivered to be discounted, in 3 Chit. Crim. L. 985.

<sup>b</sup> S. 3.

[\*1249] mission of the offence. (c) It also provides that the act shall \*not affect any trustee, or mortgagee, in respect of any acts done in relation to the property comprized in or affected by the trust or mortgage. (d) And that it shall not extend to restrain any banker, merchant, &c. or other agent, from selling, or disposing of any securities, property, or effects, in their custody or possession, upon which they have any lien, or demand, which by law entitles them to sell or dispose thereof, unless such sale or disposal shall extend to a greater number, or part of such securities, or effects, than shall be necessary for the purpose of satisfying their lien or demand. (e)

By s. 5. no person is to be convicted if he shall, previously to being indicted, have disclosed the matter by compulsory process in any action, &c. in which he shall have been a party, and which shall have been bonâ fide instituted by the party aggrieved.

S. 7. Punishment of offenders in Scotland.

[\*1250] Embezzlements of minor importance. 54 Geo. III. c. 110. As to embezzlements by pensioners or nurses in Greenwich hospital.

The fifth section of the statute, after providing that nothing in the act contained, nor any proceeding thereupon, shall prevent, or lessen, any remedy at law, or equity, which the party aggrieved might have had, if the act had not been made, but that the conviction of an offender against the act shall not be evidence in any action at law or suit in equity against such offender; enacts, “that no person shall be liable to be convicted by any evidence whatever as an offender against this act, in respect of any act, matter or thing done by him, if he shall at any time previously to his being indicted for such offence, have disclosed such act, matter or thing, on oath, under or in consequence of any compulsory process of any court of law or equity, in any action, suit or proceeding, in or to which he shall have been a party, and which shall have been bonâ fide instituted by the party aggrieved by the act, matter or thing, which shall have been committed by such offender aforesaid.”

It is provided by the seventh section that persons committing, in *Scotland*, any misdemeanor against the act, shall be liable to be punished by fine and imprisonment, or by either of them, or by transportation for any term not exceeding fourteen years, as the Judges, before whom the offender is tried and convicted, shall direct.

\*Before this chapter is concluded, two modern statutes may be briefly noticed which relate to embezzlements of minor importance, and provide for their punishment by a summary mode of proceeding. The 54 Geo. III. c. 110. s. 1. reciting that several of the pensioners and nurses in the royal hospital for seamen at *Greenwich* had of late pawned, or otherwise disposed of the clothes and other goods delivered to them to wear or use, enacts that such clothes, &c. shall be marked in a particular manner; and makes any person taking in pawn or receiving them, or defacing the marks (which are to be taken as sufficient evidence of property in the commissioners and governors of the hospital), liable to a penalty of ten pounds: and further enacts, that if any pensioner or nurse

shall desert, or run away, and carry with them any clothes, &c. belonging to the hospital, they shall upon conviction be committed to the gaol of the town, &c. where they shall be apprehended, for six calendar months. (*f*)

The 55 Geo. III. c. 137. reciting that persons received into public work-houses for the relief of the poor pawn and dispose of their clothes, and the goods belonging to such work-houses, and that poor persons relieved by having clothes and apparel given them by the officers of parishes frequently pawn and sell the same, and that, by the laws then in force, no punishment could be inflicted on them, or on the persons buying or receiving the same in pawn; first vests the property of such clothes, goods, &c. in the overseers for the time being; (*g*) and then enacts, that the overseers, or other persons appointed for managing or providing for the poor, may cause all goods, clothes, linen, &c. and things belonging to such overseers or other persons, to be marked with the word "Work-house." and such other marks as they \*shall think proper, for identifying the parish, &c. by which the same shall have been provided; (*h*) and that if any person shall knowingly take in pawn, or receive any goods, &c. provided for the use of the poor in a work-house, or given to the poor by the overseers, &c. or any goods, &c. or materials belonging to a work-house; or shall receive or buy any of the provisions provided for the poor of such work-house, or shall deface the marks, &c. they shall forfeit, for every offence, not exceeding five pounds nor less than one pound, upon conviction before a justice. And it further enacts, that if any persons shall desert, or run away from any work-house, and carry with them any clothes, &c. or things as aforesaid, such persons, being lawfully convicted before any justice of the peace, shall be forthwith committed to gaol or to the house of correction for three calendar months. And it provides that the marks, &c. on such things (being duly authenticated) shall be sufficient evidence of property in the overseers, or other persons appointed as aforesaid. (*i*)

55 Geo. III. c. 137. As to embezzlements by poor persons in work-houses, &c.

[\*1251]

In a late publication a precedent is given of an indictment against a surveyor of highways, for using materials obtained for repairing the highways upon his own premises, for employing the public labourers on his own grounds, and for embezzling the gravel and other materials which had been procured for the parish. (*k*) This indictment does not appear to have been framed upon the provisions of any statute; but to

Embezzlement by a surveyor of the highways, of materials procured for repairing them at

*f* The act does not say, "conviction before a justice;" but the words are, "being lawfully convicted thereof, by the oath or oaths of one or more witnesses," &c.—*Qu.* therefore as to a conviction before a justice.

*g* S. 1. See this clause, *ante*, 1142.

*h* By subsequent part of the section, it is directed that such marks shall not be placed

on articles of wearing apparel so as to be publicly visible on the exterior of the same.

*i* 55 Geo. III. c. 137. s. 2.

*k* 3 Chit. Crim. L. 666. where it is said, in note (*p*), that this indictment was procured from the crown office, and was used in 1799 against one Robinson

the expence of the parish. have charged the offence against the defendant as a misdemeanor at common law ; laying the acts to have been done by colour of his office, and in dereliction of his duty as surveyor of the highways. (*l*)

[\*1252]

## \*CHAPTER THE SIXTEENTH.

*Of Embezzlement by Officers and Servants of the Bank of England, and by Public Officers.*

Embezzlements by officers and servants of the Bank of England.

15 Geo. II. c. 13. s. 12. Any officer, &c. of the said company being entrusted with or having any bill, &c. or other effects, and secreting the same, is made guilty of felony without benefit of clergy.

SUBSEQUENT to the transaction in the case of *Waite*, (*a*) but prior to the decision of the Judges upon it, the statute 15 Geo. II. c. 13. was passed ; the twelfth section of which relates to embezzlements by officers and servants of the Bank of England.

It enacts, “ that if any officer or servant of the said company being entrusted with any note, bill, dividend warrant, bond, deed, or any security, money or other effects, belonging to the said company, or having any bill, dividend warrant, bond, deed, or any security or effects, of any other person or persons, lodged or deposited with the said company, or with him as an officer or servant of the said company, shall secrete, imbezil, or run away with any such note, bill, dividend warrant, bond, deed, security money or effects, or any part of them ; every officer or servant so offending, and being thereof convicted in due form of law, shall be deemed guilty of felony, and shall suffer death as a felon, without benefit of clergy.”

The same provisions are repeated in the 35 Geo. III. c. 66. s. 6. and 37 Geo. III. c. 46. s. 6. (which make certain annuities created by the parliament of Ireland transferable, and the dividends payable at the Bank of England) with respect to effects deposited in pursuance of those acts. And

[\*1253]

\*there is a similar provision in the 24 Geo. II. c. 11. s. 3. with respect to the officers and servants of the South Sea company.

The 15 G. II. c. 13. s. 12. is not in any respect repealed by the 39 Geo. III. c. 85.

It appears to have been, at one time, supposed that the general words of a subsequent statute, 39 Geo. III. c. 85. cited in the preceding chapter, (*b*) might be considered as so covering the offences mentioned in the 15 Geo. II. c. 13. s. 12. as to do away the capital part of the punishment therein prescribed. (*c*) But the point having been brought under

*l* See *ante*, 213, *et sequ.* as to offences by persons in office.

*a* *Ante*, 1226.

*b* *Ante*, 1229.

*c* See the argument of *Erskine*. for the pri-

soner, in *Aslett's* second case, 2 Leach 965 : and the doubt is mentioned in 2 East. P. C. c. 16. s. 19. p. 579 ; but sufficient reasons are there given why the statute, 39 Geo. III. c. 85. should not have such an operation.

the consideration of the twelve Judges, they were unanimously of opinion that nothing is contained in the 39 G. III. c. 85. which can operate as a repeal of any part of the 15 Geo. II. c. 13. (*d*)

A question was made upon this statute, 15 Geo. II. c. 13. s. 12. whether a clerk of the bank of England, employed in taking an account of certain paid notes, who had embezzled a *paid note*, which he found upon the file, not properly cancelled, and uttered it as his own property, came within the provisions of the statute, as having embezzled *effects* belonging to the bank. It was submitted, on behalf of the prisoner, that as the note had been paid and cancelled by the bank, it could no longer be considered either as one of the securities, or as any of the *effects* mentioned in the statute; that it was once a bank-note, but had entirely lost that character by being paid and cancelled; and was become a piece of mere waste paper of no value; whereas the words, "other effects," in the statute, clearly meant such other effects as were of a like kind with those that had been enumerated before. Another point was also urged on his behalf, namely, that the prisoner had not been *entrusted* with the possession of the *\*note* in question, so as to bring him within the statute; that the evidence was that the only notes with which he was intrusted were notes from one hundred pounds to one thousand pounds; and that, therefore, the note in question, being only a note for fifty pounds, could not be one of those which he was employed to enter, and of which he had any custody. The case was, however, left to the jury, who found the prisoner guilty, after which the court said that on looking through the act they had very little doubt upon the subject; and that a *paid note* was certainly part of the *effects* belonging to the bank. But they said that as the point was important, and there had been no decision upon it, the case should be saved for the consideration of the twelve Judges. (*e*) It appears that the case was never decided by the Judges, but went off on other considerations. (*f*)

An indictment on this statute was holden bad in charging the prisoner with embezzling "certain bills, commonly called *exchequer bills*," when the person, who signed the bills on the part of government, was not legally authorized so to do. It appeared that the bills in question were issued under the statute, 43 Geo. III. c. 5. which contained a proviso that every such bill should be signed by the auditor of the exchequer, or in his name, by any person duly authorized by him to sign the same, with the approbation of three or more of the lords commissioners of the treasury, in writ-

Bakewell's case.

It seems that *paid notes*, on the file at the Bank of England, are *effects* within the statute, 15 Geo. II. c. 13. s. 12.

[\*1254]

Aslett's (first) case. The indictment charged the prisoner with embezzling "certain bills, commonly called *exchequer bills*;" and

*d* Aslett's second case, 2 Leach 970.

*e* Bakewell's case, O. B. 1802. 2 Leach 913.

*f* 2 Leach 947; and per Le Blanc. J. in Aslett's second case, 2 Leach 962. But see Aslett's second case, *post*. 1255, *et sequ*.



it was holden bad, on its appearing that the bills had been signed by a person not legally authorized to sign them. [\*1255]

Aslett's (second) case.

In this case it was holden that exchequer bills purchased by the bank for a good consideration, but signed in the name of the auditor of the exchequer, by a person not legally authorized, are "securities," or, at least, "effects," within the meaning of the 15 Geo. II. c. 13. s. 12. and that a servant of the bank, embezzling such bills, may [\*1256] be convicted of felony under that statute.

ing under their hands; but which proviso had not been complied with, inasmuch as the authority of a Mr. Jennings, by whom the bills were, in fact, signed, had not been properly renewed. Upon this it was objected, on behalf of the prisoner, that the bills in question were not legal exchequer bills; and that, as the indictment, in every count, averred the instruments, alleged to have been embezzled, to be exchequer bills, the allegation was not proved, and the prisoner \*must be acquitted. And the court were of opinion that the objection was good; that, as the formalities required by the statute, by which these bills were created, had not been complied with, they were not good exchequer bills; and that the circumstances of the Bank of England having purchased them as exchequer bills, and of the bills having in that character answered the purposes for which they were originally created, could have no effect in this case, as they could not alter the nature of the fact. (g)

But the prisoner was detained; and shortly afterwards another indictment was preferred against him, upon which he was convicted. This indictment described the exchequer bills in question as *effects* belonging to the governor and company of the Bank of England; stating the effects, in the first count, as paper writings, purporting to be exchequer bills; in the second count, as certain papers upon the credit whereof the bank had advanced a large sum of money; and in the third count, as certain papers, &c. purporting to be bills commonly called exchequer bills; and in other counts, the exchequer bills in question were called *securities* instead of effects. It was objected by the counsel for the prisoner, before any evidence was called on the part of the prosecution, that, as it had been determined, by his acquittal on the former indictment, that the papers he was charged with having embezzled were not exchequer bills at the time of the embezzlement, he could not be again charged with having embezzled the same papers, as being *effects* belonging to the Bank of England; he having committed no other act of embezzlement than that contained in the former indictment; for though by a remedial statute, 43 Geo. III. c. 60. these defective papers had been rendered good and valid exchequer bills for *civil purposes*, yet, that statute having impliedly declared that these papers were, previous to the passing it, mere waste papers, and of no value at the time the \*embezzlement of them took place, it could not *ex post facto* make them valuable *effects*, within the statute 15 Geo. II. c. 13. s. 12; which word *effects*, it was contended, could apply only to things in themselves of intrinsic value. But Le Blanc, J. observed, that the word "securities" was used

g Aslett's (first) case. *cor.* Macdonald. C. 2 Leach 954. B., Rooke, J., and Lawrence, J., O. B. 1803.

the statute as well as the word "effects;" which showed that the legislature intended that the statute should extend to other kinds of property than securities; the word effects being of a larger and more comprehensive meaning than the word securities: and he directed that the trial should proceed. The facts of the case were then proved; and the jury finding the prisoner guilty, the case was reserved for the consideration of the twelve Judges. The important question submitted to them was, whether, on the true construction of the statute 15 Geo. II. c. 13. s. 12. these papers, which were issued as exchequer bills, did, in point of law, come within the words "effects, or securities," meant to be described in the act of parliament? After able argument by counsel, and much consideration by the Judges, at different conferences, the result of their mature deliberation was communicated by Lord Alvanley, C. J. who stated that the Judges had not been unanimous upon this point, but that a majority of them were of opinion that the bills, or papers, were "effects, or securities," within the true meaning of the act, and that the prisoner was properly convicted. After finding to the great object of the legislature, in giving protection and security to the Bank of England, his lordship proceeded to state that the papers in question were papers of value; that though they might not, on the face of them, bear any descriptive legal value, yet that they carried about with them such a consequence, at least, as might make their preservation of infinite importance to the bank; that the government of the country was pledged to pay them even as they were, the holders of them having as strong a claim upon the justice of the government for such payment as if they were technically correct in all their parts; and that they were, therefore, in the true meaning of the word, securities which might be rendered available to any persons having the legal right to them. He then observed, that the papers in question were not less to be deemed *effects*; which word was very large and general term, and confined to no particular description of property, either in specie, or value; and was, therefore, probably inserted in the act, studiously, when the legislature were placing a special guard around the bank; and also that the offence of embezzling the effects, or securities, mentioned in the act, was not made larceny, where some value must attach on the thing taken, but was created a felony, which induced no necessity for any value being ascertained. He then put several cases to shew that the papers in question were *effects*; and after stating that the Judges had not found themselves driven to the extreme length of construing the word "effects" to extend to such trifling articles as the stumps of old pens, or a piece of blotting paper (an absurdity which had been supposed in argument); he said that their judgment only determined that the words of the act necessari-

[\*1257]

ly extended to such securities, or effects, as were entrusted to the officers and servants of the bank; and that the bills in question came under that description. (*h*)

Of embezzlements of the public monies by public officers, collectors, &c.

50 Geo. III. c. 59. s. 1.

Any person embezzling or fraudulently ap-

[\*1258]

plying money, &c. to be adjudged guilty, and punished by transportation, &c.

50 Geo. III. c. 59. s. 2.

Any officer, collector, &c. entrusted with public revenues, &c. to be adjudged guilty and punished by fine, &c.

A recent statute, 50 Geo. III. c. 59. has been passed for the more effectually preventing the embezzlement of money or securities for money belonging to the public, by any collector, receiver, or other person entrusted with the receipt, care, or management thereof; and it makes persons offending by such embezzlement guilty of a misdemeanor.

The first section of the statute enacts, "that if any person or persons to whom any money or securities for money shall be issued for public services, shall embezzle such money, or in any manner fraudulently apply the same to his own use or benefit, or for any purpose whatever except for public services, every such person so offending, \*and being thereof duly convicted according to law, in any part of the united kingdom, shall be adjudged guilty of a misdemeanor, and shall be sentenced to be transported beyond the sea, or to receive such other punishment as may by law be inflicted on persons guilty of misdemeanors, and as the court before which such offenders may be tried and convicted shall adjudge."

The second section enacts, "that if any such officer, collector or receiver so entrusted with the receipt, custody or management of any part of the public revenues, shall knowingly furnish false statements or returns of the sums of money collected by him or entrusted to his care, or of the balances of money in his hands or under his controul, such officer, collector or receiver so offending, and being thereof convicted, shall be adjudged guilty of a misdemeanor, and shall be adjudged to suffer the punishment of fine and imprisonment, at the discretion of the court, and be rendered for ever incapable of holding or enjoying any office under the crown."

[\*1259]

## \*CHAPTER THE SEVENTEENTH.

*Of Larceny and Embezzlement by Persons in the Post Office; of Stealing Letters; and of Secreting Bags or Mails of Letters.* (1)

*h* Aslett's (second) case, O. B. 1803 and 1804, 1 New Rep. 1. 2 Leach 958.

(1) The laws of the United States provide for the punishment of these offences.—See Ing. Dig. 687, 688.

## \*CHAPTER THE EIGHTEENTH.

*Of Larceny and Embezzlement of Naval and Military Stores. (1)*

THE statute 31 Eliz. c. 4. s. 1. enacts, "that if any person or persons having at any time hereafter the charge or custody or any armour, ordnance, munition, shot, powder or habiliments of war, of the queen's majesty's, her heirs or successors, or of any victuals provided for the victualling of any soldiers, gunners, mariners or pioneers, shall for any lucre or gain, wittingly, advisedly and of purpose to hinder or impeach her majesty's service, imbezil purloin or convey away any of the same armour, ordnance, munition, shot or powder, habiliments of war or victuals, to the value of twenty shillings at one or several times; that then every such offence shall be judged felony, and the offender or offenders therein to be tried, proceeded on, and suffer as in case of felony."

31 Eliz. c. 4. s. 1. Persons having charge of warlike stores, and embezzling them to the value of twenty shillings, guilty of felony.

Upon the exposition of this statute, it is said that "*habilitation*" is properly apparel or clothing; but that in legal understanding it not only extends to harness and armour, but to all utensils that belong to war. (a)

As to the word *habilitation*.

By the second section, prosecutions under this statute must be begun within a year next after the offence. And it is provided also, that the offender shall not lose his lands, &c. except during his life; and that the act shall not cause corruption of blood, or loss of dower.

Limitation of prosecutions, &c.

\*The 22 Car. II. c. 5. after reciting that persons were emboldened to the committing of the offences mentioned in the statute of 31 Eliz. c. 4. by their being within the benefit of clergy, enacts, "that no person or persons who shall be indicted for any offence committed against the said recited act (31 Eliz. c. 4.) or shall feloniously steal or embezzle any of his majesty's sails, cordage, or any other his majesty's naval stores to the value of twenty shillings," and thereupon found guilty by verdict, confessing, not answering directly, standing wilfully mute, challenging above twenty, or being outlawed, shall be admitted to the benefit of clergy. (b) But the act further provides, that it shall be lawful for the Judges before whom such offender shall be arraigned and condemned, at their discretion to grant a reprieve for staying execution, and to cause such offender to be transported for

22 Car. II. c. 5. Persons of-  
[\*1279]  
fending against the 31 Eliz. c. 4. or stealing or embezzling cordage, &c. to the value of twenty shillings, excluded from clergy.  
But the Judge may grant a reprieve, and

<sup>a</sup> 3 Inst. 79.

<sup>b</sup> 22 Car. II. c. 5. s. 3.

(1) See the statute of the United States for punishing the embezzlement of naval and military stores, which is nearly verbatim with this statute of 31 Eliz. Ing. Digest. 157.

transport  
the of-  
fender.

But if the  
offender  
refuse to  
be trans-  
ported, or  
return  
from trans-  
portation,  
he shall be  
put to exe-  
cution.

seven years, to be accounted from the time of such transportation, and during all that time there to be kept to hard labour: And it then enacts, that "if such offender shall refuse to be so transported, or after such transportation shall return or come again into this kingdom of England, or the dominion of Wales, or town of Berwick upon Tweed, within the time aforesaid, that then and in every such case the person so returning shall be put to execution upon the judgment so given and pronounced against him." (c)

This statute does not extend to accessories or appeals. It is recognized as an existing law in subsequent statutes on the same subject, which create several new offences: (d) and the 1 Geo. I. st. 2. c. 25. s. 11. expressly declares that no clause, &c. in that act contained shall in any way repeal or alter it. And it is extended to Ireland by the 52 G. III. c. 12.

[\*1280]

Embezzle-  
ments un-  
der the  
value of  
twenty  
shillings  
punishable  
at common  
law.

The statutes 31 Eliz. c. 4. and 22 Car. II. c. 5. speak only of embezzlement or stealing of stores to the value of twenty shillings; but it seems that any of the officers who have a bare charge of taking care of the stores in the king's warehouses, or a mere authority to order them to be delivered out to the several workmen or others properly authorized to receive them, may be guilty of felony at common law in stealing them, to any amount, from such places of deposit. (e) And in a case where it appeared that the prisoner was foreman of one of the storehouses for naval stores in Plymouth dock, and had given security for the faithful discharge of his duty, and was entrusted with the receiving and delivering out again of the stores in the absence of the clerk, whose proper duty it was to receive and deliver them out; and the facts of the offence were, that certain kersey, for the stealing of which the prisoner was indicted, was cut off by him from a bale in the stores, and delivered by him to an accomplice, to be taken out of the yard; it was ruled that he was guilty of larceny at common law, though the value of the property so taken were under twenty shillings. (f)

1 Geo. I. st.  
2. c. 25.  
Summary  
proceed-  
ings in  
respect of  
the em-  
bezzlement  
of naval  
stores un-  
der the va-  
lue of

But some provisions respecting the embezzlement of naval stores, when under the value of twenty shillings, are made by the 1 Geo. I. stat. 2. c. 25. The third section enacts, that the principal officers and commissioners of the navy therein mentioned, or any one of them, may enquire and by warrant under hand and seal empower any person to search for stores and ammunition pertaining to the navy, which may have been privately embezzled or filched away, in like manner as justices of peace may do in case of felony, and

c S. 4.

d 2 East. P. C. c. 16. s. 53. p. 621. 39  
and 40 Geo. III. c. 89. *Post.* Chap. on Un-  
lawfully Receiving, &c. Public Stores.

e 2 East. P. C. c. 16. s. 53. p. 622.

f Thorne's case, *cor.* Palmer Serjt. *Exeter*  
Spr. Ass. 1800, 2 East. P. C. c. 16. s. 53. p.  
622.

may punish the offender by fine, imprisonment, or either of <sup>twenty shillings.</sup> them (the fine not exceeding twenty shillings, and the imprisonment not exceeding one week (g) ) the value of the goods so embezzled or filched away, not exceeding the sum of \*twenty shillings, and may cause the goods to be brought in [\*1281] again; and, if the offence be of such a nature as requires a higher and severer punishment, may commit the offender to gaol or to the custody of their messenger till he enters into recognizance, with surety, according to the nature of the offence, to appear and answer in the court of exchequer or other court where his majesty shall question him for the same, within one year following, on process being duly served upon him for that purpose.

The fourth section of this statute recites, "that divers ill-disposed persons upon pretence of carrying his majesty's naval goods, provisions, victuals, stores and ammunition from his majesty's yards, wharfs, storehouses or other places, to his majesty's ship or ships, or to such ship or ships as are employed in his majesty's service, or such persons as are employed to recarry or remove from the said ship or ships such naval stores, goods, provisions, victuals, stores, and ammunition, to such his majesty's yards, wharfs, storehouses or other places, do frequently imbezil, take and carry them away, where they cannot be found, and remove themselves to places unknown, before they can be apprehended or convicted by due process of law, by reason that those witnesses that should prove the said facts are bound forth to sea, or otherwise employed elsewhere, and it is found necessary that justice be more speedily done in such cases, than by ordinary course of law it can be:" and then it enacts "that the treasurer, comptroller, surveyor, clerk of the acts and commissioners of the navy for the time being, or any one or more of them, where the goods so imbezilled, taken or carried away, shall be under the value of twenty shillings, shall have full power and authority, upon the oath of one or more witnesses (which they or any of them have hereby power to administer) or confession of such party so offending, as aforesaid, or other legal proof thereof, to convict the party or parties so offending, by writing under his or any of their hands and seals, and to impose such \*fine or fines upon all and every such person or persons so offending and convicted as aforesaid, as to the said treasurer, comptroller, surveyor, clerk of the acts and the commissioners of the navy, for the time being, or any one or more of them, shall in his or their discretion seem meet; the said fine or fines not exceeding double the value of the naval goods, provisions, victuals, stores, or ammunition so imbezilled or carried away; which fine or fines shall be levied by distress and sale of the goods of such offender, by virtue of the war-

S. 4. recites the necessity of justice being more speedily done in many cases of embezzlements of naval stores.

The treasurer, commissioners, &c. of the navy, when the goods embezzled are under the value of 20s. may convict the offenders in a summary way, and impose fines, &c. [\*1282]



rant of such officer or officers, who shall so convict the said offender, directed in manner aforesaid, to the person or persons aforesaid, returning the overplus, if any be, to the owner of such goods: or in case no sufficient distress can be found, as aforesaid, the party or parties so offending shall, by virtue of the warrant of such officer before whom such person or persons shall be convicted, be imprisoned in the next gaol for any space of time not exceeding three months without bail or mainprize."

9 Geo. III.  
c. 30. s. 5.  
As to the  
apprehen-  
sion of  
persons  
stealing or  
embezzling  
naval  
stores.

The statute 9 Geo. III. c. 30. s. 5. relates to the apprehension of persons stealing or embezzling naval stores. It enacts that for the more speedy and effectual bringing to justice persons guilty of stealing or embezzling his majesty's naval stores, the treasurer, comptroller, surveyor, clerk of the acts, or any commissioners of the navy for the time being, may, from time to time in all places whatsoever, exercise the office of a justice of the peace to all intents and purposes, in causing any person who shall be charged with stealing or embezzling of any naval stores, the property of his majesty, to be apprehended, committed, and prosecuted for the same; and it requires all constables and other officers to execute and obey all warrants of such persons, touching any of the matters and things thereinbefore contained.

55 Geo.  
III. c. 108.  
s. 127.  
[\*1283]  
Persons  
employed  
in the care  
of military  
stores, em-  
bezzling,  
&c. may be  
tried by a  
court-mar-  
tial and be  
transported, &c.

Provision is made for the punishment of persons embezzling military stores, by the proceedings of a court-martial. \*The statute 55 Geo. III. c. 108. s. 127. (h) enacts, "that every paymaster or other commissioned officer of his majesty's forces, or any storekeeper, or commissary, or deputy or assistant commissary, or other person employed in the commissariat department, or in any manner in the care or distribution of any money, provisions, forage or stores, belonging to his majesty's forces, or for their use, who shall embezzle or fraudulently misapply, or cause to be embezzled or fraudulently misapplied, or shall knowingly or wilfully permit or suffer any money, provisions, forage, arms, cloathing, ammunition or other military stores, to be embezzled or fraudulently misapplied, or to be spoiled or damaged, may be tried for the same by and before a general court-martial; and it shall be lawful for such court-martial to adjudge any such pay-master or other commissioned officer, storekeeper or commissary, or deputy or assistant commissary, or other person, to be transported as a felon for life, or for any certain term of years, or to suffer such punishment of pillory, fine, imprisonment, dismissal from his majesty's service, and incapacity of serving his majesty in any office civil or military, as any such court shall think fit, according to the nature and

<sup>h</sup> The mutiny act of 1815. A similar enactment is contained in the subsequent mutiny

acts 56 Geo. III. c. 10. and 57 Geo. III. c. 12.

degree of the offence, and every such officer or person shall in addition to any other punishment make good, at his own expence, the loss and damage sustained which shall have been ascertained by such court-martial; and the loss and damage so ascertained as aforesaid may be recovered in any of his majesty's courts of record at Westminster or in any other courts of law having jurisdiction where any person adjudged by a court-martial to have incurred any such penalties or to make good any such losses or damages shall be resident after the said judgment shall be confirmed and made known; and after the said sum shall be recovered and levied the same shall \*be applied and disposed of as his majesty [\*1284] shall direct and appoint."

The offences of knowingly receiving, or concealing naval or military stores which have been stolen, or of unlawfully having possession of naval or military stores, will be mentioned in a subsequent chapter.

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**\*CHAPTER THE NINETEENTH.**

[\*1285]

*Of Larceny and Embezzlement of Cloth and other Manufactures. (1)*

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**\*CHAPTER THE TWENTIETH.**

[\*1295]

*Of Larceny and Embezzlement from Lodgings.*

It was long doubted whether, as a lodger had a special property in the goods which were let with his lodgings, the stealing of them was felony: (a) and it was at length decided by a majority of the Judges that it was not. (b) In *Qu.* offence at common law.

<sup>a</sup> *Raven's alias Aston's case*, Kel, 24, 81, 12, 1 Hawk. P. C. c. 43. s. 2. And see as to a special property or bare use, &c. *ante*, 1132.

<sup>b</sup> *Meeres's case*, Show. 50. One of the Judges thought it was felony, and that a lodger had a bare use of the goods, like a guest. And two of the Judges only thought it no felony, because no intent was found to steal, either in the taking the lodgings, or carrying away the goods. And all the Judges thought it a point deserving very good consideration. Show. 55. Mr. East remarks upon the point,

that if it clearly appear that a lodger took the lodgings with intent to gain a better opportunity of rifling them, and to elude the law, there seems no reason why it should not be felony at common law. 2 East. P. C. c. 16. s. 26. p. 585. And in 6 Ev. Col. Stat. Pt. V. Cl. VII. No. 17. p. 472. note (13) a *Qu.* is made whether it would not now be holden that a lodger purloining furniture is guilty of larceny at common law, on the ground of the possession still continuing in the owner of the house.

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(1) This chapter which relates wholly to the statutes of Great Britain, is omitted

consequence of this decision, a statute was passed which enacts and declares that such offence shall be taken to be larceny and felony.

3 W. and  
M. c. 9. s.  
5. makes  
the offence  
larceny  
and felony.  
[\*1296]

This statute is the 3 W. and M. c. 9. s. 5. which recites, that it was a frequent practice “for idle and disorderly persons to hire lodgings with an intent to have an opportunity to take away, imbezil, or purloin the goods and furniture being in such lodgings,” and then enacts and declares “that if any person or persons shall take away, with an intent to steal, imbezil or purloin, any chattel, bedding, or furniture which by contract or agreement he or they are to use, or shall be let to him or them to use, in or with such lodging, such taking, imbezilling, or purloining, shall be to all intents and purposes taken reputed and adjudged to be larceny and felony, and the offender shall suffer as in case of felony.”

Construc-  
tion of this  
statute.

It is said that, notwithstanding this is a declaratory as well as an enacting law, yet the declaratory part of it must be construed with reference to the preamble. (c) Upon this it is observed that it has been holden in many cases, that the general operation of the enacting part of a clause should not be controuled by the preamble stating only a limited ground of complaint; although, certainly, there are cases the contrary way. (d)

A ready  
furnished  
house, the  
whole of  
which is let  
to the par-  
ty, is not a  
lodging  
within the  
meaning of  
the statute.

It has been ruled, that a ready furnished house, the whole of which is let, and no part of it reserved to the lessor, is the mansion-house, and not the lodging of the lessee within the meaning of the statute. (e) So in a subsequent case, where the prisoner was indicted for stealing some silver spoons in a lodging-house, an objection was taken by his counsel that the case was not within the statute, upon the following evidence. The prosecutor let to the prisoner a ready furnished house at Brighton for a month; and gave him an inventory of the furniture (amongst which were the spoons in question,) under an express contract, that if any of the goods therein specified should be injured or missing at the end of the time, he the prisoner should make them good. The keys of the house were accordingly delivered to him; and he took possession of it, lived in it, and hired and employed his own servants. The fact of taking the spoons having been clearly proved, and the prisoner having been convicted, the objection was referred to the consideration of the twelve Judges, who all (except Grose, J. who was absent) agreed that the case was not within the act of parliament. Eyre, C. J. said, it was meant to apply to cases where the owner had a possession, and the lodger the use, and was made to obviate a doubt as to the owner's possession. And Buller, J. referred to the statute 30 Geo. II. c. 3. as explana-

[\*1297]

c 2 East. P. C. c. 16. s. 26. p. 586.

d 6 Ev. Col. Stat. Pt. V. Cl. VII. No. 17. c. 43. s. 3.

p. 472. note (14).

e Brown's case, O. B. 1789. 1 Hawk. P. C.

tory of the word *lodger*, where it gives a penalty against householders for not giving an account of their lodgers to the assessors of the land tax. Some of the Judges also thought, that the agreement to make good what should be missing took this case out of the statute. (*f*)

It has been said, that the mere act of *pawning* the furniture let with a lodging is hardly sufficient evidence against the lodger of his intention to convert them feloniously to his own use, if it appear that he had been in the habit of so doing, for the purpose of supplying a temporary necessity, and of restoring the goods to the lodgings at a subsequent time; for that the statute 30 Geo. II. c. 24. s. 3. enacts, "that if any person shall pawn the goods of another without his consent, he shall, on conviction, on the oath of one witness before one magistrate, forfeit twenty shillings, and the full value of the goods, and if not paid, be committed to the house of correction as the act directs;" (*g*) \*and it has been repeatedly holden that a statute inflicting a lesser penalty is to be taken, in that particular instance, as a virtual repeal of a statute inflicting a greater penalty on the same offence. (*h*)

*Pawning*  
the goods  
let with a  
lodging.

[\*1298]

It is necessary, in an indictment on this statute, to state correctly the contract for the lodgings; and to set forth as well the name of the person by whom, as of the person to whom, they were let. (*i*) If the lodgings be let to two persons, as to a mother and her widowed daughter, the indictment must state the joint contract. (*k*) And a case is reported where upon an indictment against Robert Goddard and Sarah Fraser, which charged them with stealing certain goods in a lodging room let by contract by the prosecutor to the said Robert Goddard, to be used by the said Robert Goddard and Sarah Fraser, with the lodging," it appeared in evidence, that Goddard came in the first instance to look at and take the lodgings, but that upon his saying that he was a married man, the wife of the prosecutor refused to let the lodgings to him, and desired him to send his wife, upon which the other prisoner, Sarah Fraser, came to the house in the character of Goddard's wife, and the contract for the lodgings was made with her; and it was ruled, that the indictment was not sup-

The contract for the lodgings must be correctly stated in the indictment.

*f* Palmer's case, 1795. 2 Leach 680. 2 East. P. C. c. 16. s. 26. p. 586. It should be observed, that in this case, besides several counts on the statute, there was a count for a larceny at common law. The prisoner remained in the gaol for the county of Sussex, while the case was under the consideration of the Judges; and one report states, that at the Summer assizes for Sussex, 1795, Macdonald, C.B. ordered him to be discharged, saying, "I am sorry that the laws of England have not provided for your case, for I have no doubt

whatever of your guilt." 2 Leach 692.

*g* And subsequently the 39 and 40 Geo. III. c. 99. s. 3. increased the penalty to a sum not exceeding five pounds, nor less than twenty shillings.

*h* Patum's case, *cor.* Adair, Record. O. B. 1785. 1 Hawk. P. C. c. 43. s. 10. And see *ante*, 1185.

*i* Pope's case, O. B. 1784. 1 Leach 386. 2 East. P. C. c. 16. s. 26. p. 537.

*k* Bill's case O. B. 1751. 1 Hawk. P. C. c. 43. s. 7.

ported by the evidence, as it stated the lodgings to have been let to Goddard, whereas in fact they were let to Fraser. (l)

Contract  
with a mar-  
ried wo-  
man.

[\*1299]

But it has been determined, that if lodgings be let to a *married woman*, during co-habitation with her husband, and her husband afterwards assent to the contract, the indictment must state that the lodgings were let to the husband, and will be erroneous, if it state that they were let to the *wife*. (m) And it is said, that if the indictment state the lodgings as let to the husband, and it appears upon the evidence that they were in fact let to the wife, the wife may nevertheless be found guilty, if from the husband seldom coming thither, being absent at the time the goods were taken, and other circumstances, the presumption of the wife having acted under his coercion be sufficiently negatived. (n)

Statement  
of the goods  
being let  
at the time  
they were  
stolen.

Where an indictment upon this statute charged, that C. D. the prisoner, on &c. at &c. "the goods and chattels of one A. B. (the same goods and chattels being in a certain lodging-room in the dwelling-house of the said A. B. there situate let by contract by the said A. B. to the said C. D. and to be used by the said C. D. with the lodging aforesaid) then and there being found feloniously did steal, &c." it was objected, in arrest of judgment, that the indictment was defective in omitting to state that the goods were let *at the time* they were stolen. But all the Judges held, that the indictment was sufficient; and Ashhurst, J. in delivering their opinion, said, that the form was that which had always been used in indictments upon this statute. (o)

[\*1300]

Contract  
expired.

\*It was urged in support of the objection in this case, that it did not appear on the indictment, that the contract was at an end at the time the felony was committed. And it has been ruled, that if upon an indictment on the statute it appear by the evidence that the goods were taken after the term, for which the contract was made, had expired, the prisoner must be acquitted. (p)

l Goddard and Fraser (case of), 2 Leach 545.

m Pike's case, cor. Gould, J. O. B. 1784. 1 Hawk. P. C. c. 43. s. 4.

n Mann's case, cor. Ashhurst, J. O. B. 1786. 1 Hawk. P. C. c. 43. s. 6. With respect to the coercion of the husband in cases upon this statute, it is said, that it seems, that an indictment cannot be supported against a wife for stealing goods from a lodging, let by contract to her husband, if it appear in evidence that the husband cohabited with her at the time the felony was committed, for that she

is in such case under his coercion, and it shall be presumed to have been done by his command or consent. 1 Hawk. P. C. c. 43. s. 5. citing May's case, cor. Hotham, B. O. B. 1784. But it is submitted that in this, as in other cases of like presumption, the coercion may be negatived if the contrary can be made to appear. See ante, 23, 24.

o Burnel's case, 1793. 2 Leach 588. 2 East. P. C. c. 16. s. 26. p. 587. 1 Hawk. P. C. c. 43. s. 12. 2 Stark. Crim. Plead. 432.

p Butler's case, O. B. 1784. 1 Hawk. P. C. c. 43. s. 8.

**\*CHAPTER THE TWENTY-FIRST.**

*Of Receiving Stolen Goods.*(1)

**RECEIVERS** of stolen goods were at common law punishable only as for a misdemeanor, even after the thief had been convicted of felony in stealing them : (a) but now, by the provisions of several statutes, such receivers are made accessors. The offence at common law was only misdemeanor.

a Fost. 373.

(1) **MASSACHUSETTS.**—The statutes of Massachusetts made for the punishment of the offence of receiving stolen goods, are substantially the same as those of Great Britain. The tenth, eleventh, twelfth and thirteenth sections of the statute of 16th March, 1805, particularly relate to this offence, and are so similar to the provisions in some of the English statutes contained in this chapter on the same subject, that the construction and expositions of the latter in the English courts, are applicable to the statute of this state above mentioned.

**Thomas Andrews**, was indicted at March term 1806, in Suffolk, for knowingly receiving, &c. stolen goods, the property of *Moses Dow*, before feloniously stolen by one *Amos Tuttle*. It appeared in evidence that *Tuttle* stole the goods in New Hampshire, that they were brought to Boston in this state, and sold to *Andrews*, the defendant, under circumstances which showed satisfactorily that he must have known them to have been stolen. Upon a motion for a new trial, as on a verdict against evidence, the court decided that a person, receiving in this state, goods stolen in another state knowing them to be stolen, may be indicted in this state as a receiver of stolen goods. *Cullin's case* (1 Mass. Rep. 116)—and *Lord's case* decided at York, June term, 1792, were considered directly in point, and conclusive against the motion, which was overruled. *Commonwealth v. Andrews*, 2 Mass. Rep. 14.

In a subsequent case against the same defendant, *Thomas Andrews*, he was indicted for receiving stolen goods, &c. the property of *Josiah Bellows* and *David Stone*, which had been stolen by *Amos Tuttle*. To this indictment, the defendant pleaded in bar, in substance, that he had been tried and convicted for having knowingly, &c. received of the same *Amos Tuttle*, other goods which had been previously stolen by him from *Moses Dow*; that the judgment upon the former conviction, still remained in force; that the goods mentioned in this indictment, and alleged to have been stolen from *Bellows* and *Stone*, and those alleged to have been stolen from *Dow*, were in the same packages and parcels, at the time they were received by the defendant; that they were all received by him at the same time; and that the act of receiving them was one and the same. This plea was adjudged insufficient.

The guilt of the accessory is in relation to the crime of the principal, and as the principal in this case, had committed two crimes, the defendant by his participation, was equally guilty of both. *Commonwealth v. Andrews*, 2 Mass. Rep. 409.

**UNITED STATES.**—"If any person or persons within any part of the jurisdiction of the United States, shall receive or buy, any goods or chattels that shall be feloniously taken or stolen from any other person, knowing the same to be stolen, or shall receive, harbour or conceal, any felons or thieves, knowing



ries after the fact to the felony of the thief, in cases where the thief has been convicted, or is amenable to justice: and are made liable to be prosecuted for a misdemeanor in cases where the thief has not been convicted, and whether he is amenable to justice or not.

Receivers  
now pun-  
ishable as  
accessories  
after the  
fact, where  
the thief  
can be  
brought to  
justice.

3 W. and  
M. c. 9. s. 4.

The statutes which make receivers accessories after the fact to the felony, are the 3 W. and M. c. 9. s. 4. and the 5 Ann. c. 31. s. 5. And the statute 4 Geo. I. c. 11. makes such receivers punishable by transportation for fourteen years.

The 3 W. and M. c. 9. s. 4, recites, that thieves and robbers were much encouraged to commit the offences therein mentioned, because a great number of persons made it their trade and business to deal in the buying of stolen goods; and then enacts, "that if any person or persons shall buy or receive any goods or chattel that shall be feloniously taken or stolen from any other person, knowing the same to be stolen, he or they shall be taken and deemed an accessory or accessories to such felony after the fact, and shall incur the same punishment as an accessory or accessories to the felony after the felony committed."

[\*1302]

5 Anne, c.  
31. s. 5.

\*The 5 Anne, c. 31. s. 5. recites, that such felons as were before-mentioned in the act were much encouraged to commit such burglaries and felonies, because a great number of persons made it a trade to receive and buy of them the goods so by them feloniously taken, and also did make it their business to harbour and conceal the offenders: and enacts, "that if any person or persons shall receive or buy any goods or chattels that shall be feloniously taken or stolen from any other person knowing the same to be stolen, or shall receive, harbour or conceal any burglars, felons or thieves, knowing them to be so, shall be taken and received as accessory or ac-

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them to be so, he or they being of either of the said offences legally convicted, shall be liable to the like punishments as in the case of larceny."—Ing. Digest, 157, 8.

SOUTH CAROLINA.—Oliver Scoval was indicted for receiving stolen goods. The facts were, that Brown the principal felon, brought the goods to the house, where the defendant and one Sterret lived together; that the prisoner had knowledge that Brown had stolen them; that afterwards a passage was engaged by Sterret for the prisoner, on board a vessel bound to North Carolina; that the stolen goods were sent in a trunk to the vessel, with another trunk containing the prisoner's cloths; that Sterret and the prisoner went to the vessel, when the former said to the Captain, "here is your passenger and his baggage;" that the trunks were received as the prisoner's, and that he gave directions that one of them should be put into the hold of the vessel. This was held to be such a reception of the goods, as justified a conviction under the statute, for receiving stolen goods; the possession of the goods at the house before the removal, was a sufficient possession under the statute; but the subsequent acts of the prisoner, shew an actual and independent possession.—1 South Carolina, Rep. 274.

cessories to the said felony or felonies ; and being of either of the said offences legally convicted, by the testimony of one or more credible witnesses, shall suffer and incur the pains of death as a felon convict." It is observed upon this statute, that though the enacting words are so general, yet not only the title and other previous provisions of the act, but also the recital to the clause in question, are all confined to the offences of burglary and house-breaking. (b)

By the 4 Geo. I. c. 11. s. 1. persons "convicted of receiving or buying stolen goods knowing them to be stolen" may be transported for fourteen years. This punishment, it should be observed, does not extend (though the words of the act are general) to prosecutions for a misdemeanor only in receiving stolen goods, where the principal has not been convicted, and is not amenable to justice, under the acts which will be presently mentioned. (c) And it does not take away the necessity of the receiver praying the benefit of the statute. (d)

Punishment, where the receiver is convicted as an accessory after the fact.

As the effect of these statutes is to make the receivers of \*stolen goods accessories to the original felony of stealing them, and not to create any new offence, it follows that they can apply only to such cases as admit of accessories. Therefore, if a principal and receiver be indicted together, and the indictment only charge the principal with stealing to the amount of twelve pence, the receiver ought not to be put upon his trial ; and if upon an indictment against the principal and receiver, or against the principal alone, the principal be convicted of stealing to the amount only of twelve pence, the receiver cannot be convicted as an accessory. (e) For, as we may remember, there are no accessories in petit larceny. (f)

A receiver [\*1303] cannot be punished as an accessory in petit larceny.

It was also a consequence of making the receivers of stolen goods accessories after the fact to the felony, that a receiver could not be convicted, unless the principal offender, the thief, were prosecuted and convicted also ; as no misdemeanor at common law could be supported, being merged in the felony. (g) This was felt to be a great inconvenience ; for as the receiver could not be tried or punished unless the thief were convicted, he frequently escaped with impunity by keeping the thief out of the way. And, in order to remedy the evil, not very long after the act 3 W. and M. c. 9. a statute was passed for the purpose of making receivers punishable as for a misdemeanor, though the principal were not before convicted ; which statute was shortly afterwards followed by another making similar provisions in cases where the principal could not be taken so as to be prosecuted and convicted ; and a statute passed in

And a receiver cannot be convicted as an accessory, unless the principal be convicted also.

Receivers may be punished as for a misdemeanor, though the thief be not

b 2 East. P. C. c. 16. s. 141. p. 744. The title of the statute is, "An act for the encouraging the discovery and apprehending of house-breakers."

c 2 East. P. C. c. 16. s. 142. p. 745.

d 2 East. P. C. c. 16. s. 141. p. 744.

e Evans's case, Fost. 73.

f *Ante*, 43, 1032.

g Rex v. Cross and wife, 13 W. III. 1 Lord Raym. 711, 712. Fost. 373. 2 East. P. C. c. 16. s. 142. p. 744.

convicted,  
and wheth-  
er he be  
amenable  
to justice  
or not.

the present reign enacts, that a receiver of stolen goods may be prosecuted for a misdemeanor, whether the thief be amenable to justice or not.

These statutes are, the 1 Ann. st. 2. c. 9. s. 2., the 5 Ann. c. 31. s. 6., and the 22 Geo. III. c. 58. s. 1.

[\*1304]  
1 Anne, st.  
2. c. 9. s. 2.

\*The statute 1 Ann. st. 2. c. 9. s. 2. recites, that buyers and receivers of stolen goods did oftentimes convey away and conceal the principal felons, so that they could not be convicted of such principal felony, and thereby such buyers and receivers had escaped punishment, to the great encouragement of the buying and receiving of such stolen goods: And enacts, that "it shall and may be lawful to prosecute and punish every such person and persons buying or receiving any stolen goods, knowing the same to be stolen, as for a misdemeanor, to be punished by fine and imprisonment, although the principal felon be not before convicted of the said felony, which shall exempt the offender from being punished as accessory, if the principal shall be afterwards convicted."

5 Anne, c.  
31. s. 6.

The statute 5 Anne, c. 31. s. 6. enacts, "that if any such principal felon cannot be taken, so as to be prosecuted and convicted for any such offence, yet nevertheless it shall and may be lawful to prosecute and punish every such person and persons buying or receiving any goods stolen by any such principal felon, knowing the same to be stolen, as for a misdemeanor, to be punished by fine and imprisonment, or other such corporal punishment as the court shall think fit to inflict, although the principal felon be not before convict of the said felony; which shall exempt the offender from being punished as accessory, if such principal felon shall be afterwards taken and convicted."

But the  
construc-  
tion on  
these stat-  
utes was,  
that the  
[\*1305]  
receiver  
ought not  
to be pro-  
secuted for  
a misde-  
meanor,  
where the  
principal  
was amen-  
able to jus-  
tice.

After these acts were passed, it appears to have been the better opinion, that in cases where the principal was amenable to justice, the receiver ought still to have been prosecuted as an accessory to the felony, and not for a misdemeanor only. (*h*) And where the principal felon had been convicted and executed, it was ruled, that an indictment for a misdemeanor would not lie against the receiver; on the ground that the statute 5 Anne only applies to cases where the principal felon cannot be taken and convicted. (*i*) But where the prosecutor, who had it in his power at one time to have secured the principal, neglected to do so, but afterwards used his best exertions for that purpose, it was holden that the receiver might be prosecuted for the misdemeanor. Considerable difference of opinion, however, prevailed upon the point. Four of the Judges thought, that where a pro-

*h* Fost. 373.; where the doctrine of the prosecutor having an option to prosecute for the misdemeanor, or for the felony, in such case as it seems to be laid down in *Rex. v. Pollard and Taylor*, 2 *Ld. Raym.* 1370. is de-

nied. And see 2 *East. P. C. c.* 16. s. 142. p. 745.

*i* *Wild's (Jonathan) case*, O. B. Sess. bef. *East. T.* 5 *Geo. I.* 2 *East. P. C. c.* 16. s. 142. p. 746.

secutor had it once in his power to take the principal and neglected it the case was taken out of the statute of Anne. But seven Judges were of opinion, that the word "cannot" in the statute must be applied to the time of the prosecution for the misdemeanor, if the principal were then, without collusion, out of custody: and that the case was of that description; for though the prosecutor had acted weakly and negligently at first, yet when he had the principal a second time in his power he was rescued by force, and all due diligence was afterwards used to apprehend him. (k)

But questions of this kind will not arise upon the more recent statute 22 Geo. III. c. 58. which expressly provides for the prosecution of the receiver, as for a misdemeanor, whether the principal be amenable to justice or not. The first section enacts, "that in all cases whatsoever, where any goods or chattels (except lead, iron, copper, brass, bell-metal and solder, (l) ), shall have been feloniously taken or stolen, whether the offence of the person or persons so taking or stealing the same shall amount to grand larceny or some greater offence, or to petit larceny only (except where the person or persons actually committing the \*felony shall have been already convicted of grand larceny, or of some greater offence), every person who shall buy or receive any such goods and chattels, knowing the same to have been so taken or stolen, shall be held and deemed guilty of, and may be prosecuted for a misdemeanor, and shall be punished by fine, imprisonment or whipping, as the court of quarter sessions, who are hereby empowered to try such offender, or as any other court before which he, she or they, shall be tried, shall think fit to inflict; although the principal felon or felons be not before convicted of the said felony, and whether he, she or they is or are amenable to justice or not; any law or statute to the contrary notwithstanding: And in cases where the felony actually committed shall amount to grand larceny, or to some greater offence, and where the person or persons actually committing such felony shall not be before convicted, such offender or offenders shall be exempted from being punished as accessory or accessories, if such principal felon or felons shall be afterwards convicted."

At this time the statute 22 Geo. III. c. 58. expressly provides for the prosecution of the receiver, as for a misdemeanor, [\*1306] whether the principal be amenable to justice or not.

The second section relates to stolen good knowingly concealed by any person, and enacts, "that it shall and may be lawful for any one justice of the peace, upon complaint made before him, upon oath, that there is reason to suspect that stolen goods are knowingly concealed in any dwelling-house, outhouse, garden, yard, croft, or other place or places, by

22 Geo. III. c. 58. s. 2. A justice may issue a search warrant for stolen

k Wilkes's case, 1774, 1 Leach 103. 2 East. P. C. c. 16. s. 142. p. 746.

l The receiving the stolen articles here ex-

cepted is provided for by the 29 Geo. II. c. 30. which will be mentioned in a subsequent Chapter

goods knowingly concealed; and if they are found, the persons, having them in custody, being privy, &c. are made guilty of a misdemeanor.

[\*1307]

22 Geo. III. c. 58. s. 3. Persons carrying stolen goods after sun setting and before sun rising, may be apprehended, and being convicted, shall be holden guilty of misdemeanor, and imprisoned for any time not exceeding six nor less than three months.

warrant under his hand and seal, to cause every such dwelling-house, &c. or other place or places, to be searched in the day-time; and the person or persons knowingly concealing the said stolen goods, or any part thereof, or in whose custody the same, or any part thereof shall be found, he, she or they being privy thereto, shall be deemed and held guilty of a misdemeanor, and shall and may be brought before any justice of the peace for the county, city, town corporate, riding, division, liberty or place, and made amenable to answer the same, by like warrant of any such justice; and being thereof convicted by due course of law, shall be punishable in the manner aforesaid."

\*The third section provides for the punishment of persons carrying stolen goods after sun setting and before sun rising. It enacts, "that every constable, headborough or tithingman, in every county, city, town corporate, riding, division, liberty or other place where there shall be officers, and every beadle within his ward, parish or district, and every watchman during such time only as he is on his duty, shall and may apprehend, or cause to be apprehended, all and every person and persons, who may reasonably be suspected of having, or carrying, or any ways conveying, at any time after sun setting, and before sun rising, any goods or chattels, suspected to be stolen, and the same, together with such person or persons, as soon as conveniently may be, convey or carry before any justice of the peace for the county, &c. or place aforesaid, to be dealt with according to law; and such person and persons, so carrying or conveying such goods or chattels, knowing the same to have been stolen, and being thereof convicted, by due course of law, shall be deemed and held to be guilty of a misdemeanor, and on conviction as aforesaid, shall be imprisoned for any time not exceeding six calendar months, nor less than three calendar months."

By the fifth section it is provided that the act shall not repeal any former law for the punishment of such offenders; and also, that an offender convicted under that act shall not, for the same offence, be punished by any former laws. (m)

[\*1308]

Construction of the statutes of

\*Upon the construction of the statutes of W. & M. and Anne, it has been holden that the words "goods and chattels" include sheep, and by the same reasoning other animals, as horses; and also fowls. (n) But it has been de-

m The fourth section enacts, that persons, to whom stolen goods shall be offered to be sold, owned, &c. may (if there is reasonable cause to suspect that they were stolen) carry the person, buying or offering them, before a justice. And the fifth section enacts, that if any person out of custody, or in custody, if under the age of fifteen, upon any charge of

felony within clergy, shall have committed any felony, and shall afterwards discover two or more receivers of stolen goods, so as that they shall be convicted, such discoverer shall be entitled to a pardon for all felonies committed by him before the discovery.

n 2 East. P. C. c. 16. s. 143. p. 748. Fost. 373.

ried that *money* is not within the statutes; (o) a construction which, it is suggested, may have proceeded upon the consideration that the intent of the statutes only extended to the receipt of such kinds of goods and chattels as from their capability of being identified by outward marks and circumstances, the thief might find it more difficult to dispose of without the aid of a receiver, whereas money, not having in general any such distinguishing marks, may be disposed of by the thief himself without any such aid. (p) By analogy to this decision it has been holden also that *bank-notes* are not within these statutes. But this point underwent considerable discussion, and was not unanimously decided by the Judges. Seven out of ten of the Judges were of opinion that the conviction upon which the question had been raised was bad, on the ground that the receiving bank-notes, knowing them to be stolen, was not within the statute 3 W. & M. c. 9. which they thought attached only on the receivers of property, which came under the denomination of "goods and chattels" at the time when the act passed. But two of the Judges (Gould J. and Ashhurst, J.), were strongly of a different opinion, to which the other (Lord Loughborough) also inclined; considering it as a consequence of law that where a new felony was created by statute, it drew after it all the incidents of felony at common law, and, therefore, included accessories before and after; and they thought that the statute 2 Geo. II. c. 25. s. 3. (q) having made it felony to steal bank-notes, in like manner as if the party had stolen goods of a like value, the receivers of such property stood in the same predicament as the receivers of other goods and chattels. (r) And Mr. East inclines also to this opinion in his learned work; and says that the opinion of the majority in this case seems to have been much shaken by those decisions, in which bank-notes, by the operation of the statute 2 Geo. II. c. 25. have been holden to be within the statute 12 Ann. c. 7. against stealing money, goods, &c. to the value of forty shillings, out of a dwelling-house. (s) But, upon this it has been observed, that "the cases clearly stand on very different grounds; the one relating to the description of the property as satisfying the words of the statutes against receivers; the other upon the consequences attaching under the immediate authority of the 2 Geo. II. c. 25. to the offences included therein." (t) And a decision is referred to, in which a very able crown lawyer expressly held

W. & M.  
and Anne,  
as to sheep  
and other  
animals,  
and as to  
money and  
bank-  
notes.

[\*1309]

*o* Davidson's case, *cor.* Bathurst, J. *Cart-  
tisle*, 1766. 1 Burn. *Access.* S. IV. 1 Leach  
242, note (a). Guy's case, O. B. 1782, 1 Leach  
241. 2 East. P. C. c. 16. s. 143. p. 748.

*p* 2 East, P. C. c. 16. s. 143. p. 748.

*q* *Ante*, 1114, 1115.

*r* Sadi and Morris (case of), 1787. 1

Leach 468. 2 East. P. C. c. 16. s. 143. p.  
748, 749.

*s* 2 East. P. C. c. 16. s. 143. p. 749. See  
as to the decisions referred to, concerning  
bank-notes, being within the statute 12 Anne,  
c. 7. *Ante*, 934.

*t* 16 Ev. Col. Stat. Pt. V. Cl. VII. No. 26.  
p. 490, note (5).



that an indictment could not be maintained in such case against a receiver. (u)

As to the distinction between a receiver and a principal thief. Dyer and Disting's case.

In some cases the distinction between a receiver and an accomplice has required attentive consideration.

[\*1310]

Two prisoners, named Dyer and Disting, were indicted for stealing a quantity of barilla, the property of M. Hawker. Upon the evidence it appeared, that the barilla was on board a foreign ship at Plymouth, consigned to Hawker; that Hawker employed Dyer, who was the master of a large boat, for the purpose of bringing it on shore; and that Disting, together with several others, were employed as labourers in removing it to Hawker's warehouses, after it was landed. And the jury found that, while the barilla was in Dyer's boat, some of his servants, without his \*privity, consent, or participation, severed some of it from the rest where it was stowed, and removed it to another part of the boat, where they concealed it under some rope. But they also found, that Dyer afterwards assisted the other prisoner and the persons on board, who had before separated this part from the rest, in removing it from the boat, for the purpose of carrying it off. It was objected, for the prisoner Dyer, that his offence was not that of a principal, as laid in the indictment, but that of receiver or accessory after the fact. But the learned Judge, before whom the trial was had, was of opinion that, though for some purposes, as with respect to those concerned in the actual taking and separation, the offence would have been complete by the severance and removal of the barilla to another part of the boat, as being an asportation in point of law, yet with respect to Dyer, who joined in the scheme before the barilla had been actually taken out of the boat, where it was properly deposited for the purpose of being landed, and who assisted in the act of carrying it off from thence, it was one continuing transaction, and could not be said to be completed till the removal of the commodity from such place of deposit; and that Dyer, having assisted in the act of carrying it off, was therefore guilty as principal. (v)

Case of Atwell, O'Donnell, and others.

Another case arose out of the same transaction. It appeared, that the rest of the barilla was lodged in M. Hawker's warehouse; that while it was there, several persons, employed as labourers or servants by Hawker, entered into a conspiracy to steal some of it; that accordingly, some of them, who had access to the warehouse, removed a parcel of it nearer to the door than it was before, in the course of the morning; and that about nine at night these persons, toge-

*u* *Id. Ibid.* Where the learned writer says that, in a case in which he was counsel, Sir Alexander Thomson so decided.

*v* *Rex v. Dyer and Disting, Exeter Sum. Ass. 1801, cor. Graham, B. who conferred*

with the other Judge (Le Blanc, J.) and afterwards said that he was fully satisfied that his opinion was well founded. 2 East, P. C. c. 16. s. 154. p. 767, 768.

ther with the prisoners Atwell and O'Donnell, who had  
 \*in the mean time agreed to purchase it of the others, came to [\*1311]  
 the warehouse yard, and assisted the others, who took it out  
 of the warehouse, in carrying it away from thence. They  
 were all indicted as principals in the felony; and the same  
 objection was made as before, that Atwell and O'Donnell  
 were only receivers or accessories after the fact, the felony  
 being complete before their participation in the transaction.  
 But it was ruled that, so long as the goods remained in the  
 warehouse, which was the lawful place of their deposit, al-  
 though to some purposes, as to those who severed this parcel  
 from the rest for the purpose of stealing it and more conve-  
 niently removing it afterwards, the felony might be said to  
 be complete; yet it was a continuing transaction as to those  
 who joined in the same plot before the goods were finally  
 carried away from the premises: and that all the defendants,  
 having concurred in, or being present at the act of removing  
 them from the warehouse wherein they were lawfully deposi-  
 ted, were principals. (w)

But where the goods have been so entirely taken away King's  
 from the premises or actual possession of the owner, that case.  
 their further removal cannot be deemed a continuing part  
 of the original taking, the case will come under a different  
 consideration; and the party concerned only in such fur-  
 ther removal will not be guilty of stealing the goods.  
 Upon an indictment for larceny, in stealing several firkins  
 of butter and some cheeses, the facts proved were that two  
 men, in the absence of the prisoner, broke open the ware-  
 house of the prosecutor, stole the butter and cheese in ques-  
 tion, carried them into the adjoining street, and deposited  
 them at a distance of about thirty yards from the door of  
 the warehouse: after which they went for the prisoner,  
 \*brought him to the place, and informed him of what they [\*1312]  
 had done; and he assisted in carrying the property to a cart,  
 which was kept in waiting at some distance to be ready to  
 convey it away. Upon this evidence an objection was taken  
 on behalf of the prisoner, that he could not be found guilty  
 of stealing in this case, as the felonious taking of the pro-  
 perty was complete before he had any part in the transaction.  
 It seemed however, in the first instance, to the learned Judge  
 by whom the prisoner was tried, that he might properly be  
 found guilty; on the ground that as every continuation of a  
 larceny is so far a new larceny, and a new taking, as to sus-  
 tain an indictment for larceny in any county into which the  
 property is carried, and as the possession in law of the pro-

x Rex v. Atwell, O'Donnell, and others,  
 cor. Graham, B. at the same time as the  
 preceding case of Dyer and Disting, and de-  
 cided after the like consideration. Ante, note

(r) 2 East. P. C. *Ibid.* All the prisoners  
 found guilty on both indictments as principals  
 in the two several transactions received sen-  
 tence of transportation for seven years.

perty in this case remained in the prosecutor, notwithstanding the removal of it from his warehouse to the place where it was deposited in the street, so that he might have brought trespass against any stranger taking it from the place in the street without any felonious intent; it might be considered that the prisoner, who was present aiding and abetting in a continuation of the larceny, was a principal in the larceny so continued: and the prisoner was accordingly convicted. But, the case being reserved for the consideration of the twelve Judges, it is understood that they held the conviction wrong. (x)

It is not necessary that a receiver should actually purchase the goods.

The words of the statutes of William and Anne, and also of the 22 Geo. III. c. 58. are in the disjunctive "buy or receive:" and therefore it is not necessary, in order to constitute a receiver, generally so called, that the goods should be actually purchased by him. And it is said also, that it does not seem necessary that the receiver should have any interest whatever in the goods; and that it is sufficient if they be in fact received into his possession in any manner *malô animô*, as to favour the thief, or without lawful authority express, or to be implied from circumstances. (y)

[\*1313]

A party may be indicted for receiving goods stolen by persons unknown.

But where the principal is known, it should be so stated.

\*It is quite settled that a party may be indicted for receiving goods stolen by persons unknown: and where an indictment was objected to because it did not ascertain the principal thief, and did not therefore state to whom in particular the prisoner was accessory, the Judges were unanimously of opinion that it was good; the great view of the statutes being to reach the receivers, where the principal thieves could not easily be discovered. (z) But where the principal is known, it seems proper to state it according to the truth. (a) And a case is reported in which it was ruled, that an indictment against an accessory before the fact to a larceny, which stated a stealing by "a certain person to the jurors unknown," and that the prisoner incited, &c. "the said person unknown" to commit the said felony, could not be supported where the principal felon was a witness before the grand jury. The counsel for the prosecution, in opening the case, stated that the grand jury had found the bill upon the evidence of the principal, who acknowledged that he had stolen the goods in question, and proposed to call the principal as a witness to establish the guilt of the prisoner. But Le Blanc, J. interposed, and directed an acquittal. He said, he considered the indictment wrong, in stating that the wheat had been stolen by a person unknown; and asked, how the person who was

x Rex v. King, cor. Bayley, J. York Ass. 1816, or 1818, MS.

y 2 East. P. C. c. 16. s. 153. p. 765.

z Thomas's case, O. B. 1766. 2 East. P. C. c. 16. s. 164. p. 781.

a 2 East. P. C. c. 16. s. 164. p. 781. And

see ante, 1139. that though in an indictment for larceny, the goods may be laid to be the property of persons unknown, yet such an allegation will be improper if the owner be really known.

the principal felon could be alleged to be unknown to the jurors, when they had him before them, and his name was written on the back of the bill? (b)

By the words of the statute 22 Geo. III. c. 58. s. 1. an exception is made where the person actually committing the felony "shall have been already convicted of grand larceny, or of some other greater offence." But it has been holden \*that it is not necessary to aver in the indictment that the principal has not been convicted: and the court said that it would be a negative averment, which, if laid, need not be proved by the prosecutor, but was evidence for the defendant, who by proving the affirmative would be entitled to an acquittal for the misdemeanor. (c) And supposing the averment to have been necessary, the court were of opinion that the statement in the indictment that the goods were stolen "by some persons unknown," was equivalent to saying, that those persons had not been convicted. (d)

It is not necessary to aver in an indictment on the 22 Geo. III. c. 58. that the principal has not been convicted. [\*1314]

Upon the same principle it was holden upon an indictment on the 5 Anne, c. 31. s. 6. that it was not necessary to aver that the principal felon could not be taken. (e)

Nor on 5 Anne, c. 31. s. 6. that the principal could not be taken.

In an indictment against the receiver, as an accessory after the fact to the felony, where the principal has been convicted, it is sufficient to state the *conviction*, without stating the *attainder* of the principal. In a case where it was moved in arrest of judgment that the indictment was bad because it did not state that the principal was *attainted*, the point was reserved for the consideration of the Judges; who all held that the indictment was good, upon reference to a great number of precedents, and on a consideration of the statute 1 Anne, st. 2. c. 9. s. 1, 2. (f) In a subsequent case, where the prisoner was charged with knowingly receiving stolen goods, the indictment stated that the goods had been stolen by Isaac Powell, who had been *duly convicted* of the felony at the great session for Brecon. An examined copy of the record of Powell's conviction was produced, which stated that the jury do say, "that the said Isaac Powell is guilty of the felony whereof he stands indicted, and find the value of the several goods and chattels so feloniously \*stolen, taken, and carried away, to amount to the value of forty shillings, and the said Isaac Powell, in mercy, &c." It was objected that this entry was not sufficiently formal and correct to support the averment that Powell had been *duly convicted*. But the learned Judge is said to have ruled, that the judgment was not necessary, and might be rejected: that the conviction was sufficient; that in the common case, where the receiver is tried with

It is sufficient to state the conviction, without stating the *attainder* of the principal.

[\*1315]

b Rex v. Walker, 3 Campb. 264. And S. P. by Dallas, J. Anon. Worcester Lent Ass. 1815.

c Baxter's case, 5 T. R. 83. 2 Leach 580. 2 East, P. C. c. 16. s. 164. p. 782.

d Id. Ibid.

e Rex v. Pollard and Taylor, 2 Lord Raym. 1370. Ante, 1304.

f Hyman's case, 2 Leach 925. 2 East. P. C. c. 16. s. 164. p. 782.

the thief, there is no judgment on the thief, before the verdict against the receiver; and that although this record was full of errors, yet an erroneous attainder of the principal was sufficient against the accessory until it was reversed. (*g*)

The indictment need not state time, place, &c. and the thing received may be stated under a different denomination from that which was stolen if the same in fact.

The indictment against the receiver of stolen goods need not allege time and place to the fact of stealing the goods; a statement of them to the offence of the receiver will be sufficient. (*h*) In a case where an indictment charged the prisoner by the name of Francis Morris, with receiving stolen goods, "he the said Thomas Morris knowing &c." it was holden that the words "the said Thomas Morris" might be rejected as surplusage. (*i*) It is sufficient if the thing received be the same in fact as that which was stolen, though passing under a new denomination; so that where the indictment charged the principal with stealing a live sheep, and the accessory with receiving "twenty pounds of mutton, part of the goods," &c. the conviction was holden to be proper. (*k*)

Trial of offenders receiving goods stolen in some other part of the United Kingdom. [\*1316]

4 Geo. III. c. 92. s. 8.

With respect to the trial of offenders receiving goods stolen in some other part of the United Kingdom, the 13 Geo. III. c. 31. s. 5. enacts that any person in either part of the United Kingdom receiving or having any money, (*l*) cattle, goods, or other effects feloniously taken in the other part of the United Kingdom, knowing the same to be feloniously taken, may be indicted, tried, &c. in that part of the United Kingdom where he received the same, as if the same had been feloniously taken in that part of the United Kingdom. And since the union with Ireland, the 44 Geo. III. c. 92. s. 8. makes a general provision, and enacts, "that if any person or persons in any one of the parts of the United Kingdom shall hereafter receive or have any cattle, goods or other effects, stolen or otherwise feloniously taken in any other part of the United Kingdom, knowing the same to have been stolen or otherwise feloniously taken, every such person or persons shall be liable to be indicted, tried, and punished for such offence in that part of the United Kingdom where he, she, or they shall so receive or have the said cattle, goods, or other effects, in the same manner to all intents and purposes as if the said cattle, goods, or other effects, had been originally stolen or otherwise feloniously taken in that part of the United Kingdom in which such person shall so receive or have such cattle, goods, or other effects respectively." (*m*)

*g* Rex v. Baldwin, cor. Thomson, B. Monmouth Sum. Ass. 1812. 3 Campb. 265 Qu. if this case was not afterwards submitted to the consideration of the Judges?

*h* Stott's case, 2 East. P. C. c. 16. s. 144. p. 753. and s. 163. p. 780.

*i* Morris's case, 1 Leach 109. And see also Redman's case, 1 Leach 477. where words which obstructed the sense of an indictment on the statutes 3 W. and M. c. 9. s. 4. and 5

Ann. c. 31. s. 5. were rejected as insensible and useless.

*k* Rex v. Cowell and Green, 1796. 2 East. P. C. c. 16. s. 48. p. 617.

*l* As to "money" see *ante*, 1308.

*m* This act and also the 45 Geo. III. c. 92. and the 54 Geo. III. c. 186. provide for the more easy apprehending and trying of offenders escaping from one part of the United Kingdom to the other.

The necessary evidence of the offender knowing the goods which he has received to have been originally stolen may be collected from the circumstances of the particular case; and it is said, that the buying goods at an under value is presumptive evidence that the buyer knew they were stolen. (n) In those cases where it is necessary to prove that the principal has been duly *convicted*, we have seen that \*it appears to have been ruled to be sufficient to give in evidence the examined copy of a record, shewing that he was found guilty of the felony before a court of competent jurisdiction, though the proceedings be informal, and the judgment erroneous. (o)

Evidence of guilty knowledge: and of the principal having been convicted.

[\*1317]

In prosecutions for the *misdemeanor* in receiving stolen goods, on the statute 22 Geo. III. c. 58. it is now settled that the principal felon, though not convicted or pardoned, is a competent witness against the receiver. (p)

Principal felon a witness in prosecutions on the 22 Geo. III. c. 58.

In cases where the principal and receiver are joined in the same indictment, and tried together, there is no doubt that the receiver may enter into the full defence of the principal, and avail himself of every matter of fact and every point of law tending to his acquittal; and in cases where the principal has been previously convicted though the record of the conviction will be sufficient presumptive evidence that every thing in the former proceeding was rightly and properly transacted, yet, according to great authority, it is competent to the receiver to controvert the guilt of the principal, and to shew that the offence, of which he was convicted, did not amount to felony in him, or not to that species of felony with which he was charged. (q)

The receiver may controvert the guilt of the principal.

The punishment of persons convicted of receiving stolen goods is provided for by the different statutes which have been mentioned in the course of the Chapter. And it should be observed, with respect to the receiving of stolen horses, that though by a prior statute, 31 Eliz. c. 12. s. 5., clergy was taken away as well from the accessory after as before \*the fact, yet, as that statute extends only to such persons as were in judgment of law accessories at the time the act was made, namely, accessories at common law, a person knowingly receiving a stolen horse, who is only made an accessory by these subsequent statutes, (r) is not ousted of clergy. (s)

Punishment.

[\*1318]

Before this Chapter is concluded, it will be proper to mention an offence nearly connected with that of receiving

Offence of taking a reward to

n 1 Hale 619. 2 East. P. C. c. 16. s. 153. p. 765.

o *Ante*, 1315. Rex v. Baldwin, 3 Campb. 265.

p Haslam's case, O. B. 1786, and before the twelve Judges, 1 Leach 418. 2 East. P. C. c. 16. s. 166. p. 782. Patram's case, *cor.*

Grose, J. *Bridgewater Sum. Ass.* 1787, 1 Leach 419, note (a), 2 East. P. C. *ibid.*

q Fost. 365. Smith's case, O. B. 1783, 1 Leach 288. *Ante*, 54, *et sequ.*

r That horses are within the meaning of the statutes, see *ante*, 1308.

s Fost. 372, 373.



help to  
stolen  
goods. 4  
Geo. I. c.  
11. s. 4.

stolen goods, namely, that of taking a reward to help any person to goods which have been stolen. The statute 4 Geo. I. c. 11. s. 4. recites the evil of persons who had secret acquaintance with felons making it their business to help the owners to stolen goods, and by that means gaining money, which was divided between them and the felons, to the great encouragement of such offenders; and enacts, "that whenever any person taketh money or reward, directly or indirectly, under pretence or upon account of helping any person or persons to any stolen goods or chattels, every such person so taking money or reward as aforesaid (unless such person doth apprehend or cause to be apprehended such felon who stole the same, and cause such felon to be brought to his trial for the same, and give evidence against him) shall be guilty of felony, and suffer the pains and penalties of felony, according to the nature of the felony committed in stealing such goods, and in such and the same manner as if such offender had himself stole such goods and chattels, in the manner and with such circumstances as the same were stolen."

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[\*1319]  
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In prosecutions upon this statute it seems proper to aver, that the defendant had not apprehended, or caused to be apprehended, the principal, &c. such reservation being in the enacting clause, and part of the description of the offence. (t) \*In a case where the principal felon was dead, and had not been convicted of the offence, it was objected that the person receiving the reward to help to the stolen goods could not be convicted. The point was reserved as one of great importance, and of the first impression, for the consideration of the Judges: but their opinion was never publicly communicated, though it is presumed, from the prisoner being discharged after remaining some time in gaol, that the objection prevailed. (u) With respect, however, to the part of the objection, that the principal felon had not been convicted of the offence, it is well observed that this could not have been the ground of the prisoner's discharge, inasmuch as the statute, by the very terms of it, precludes the supposition of a conviction of the principal being a necessary preliminary to the trial and punishment of the offender; for it states that the offender shall be guilty of felony, &c. unless he doth "apprehend, or cause to be apprehended, the felon who stole the goods, and cause such felon to be brought to his trial for the same, and give evidence against him." And it is therefore suggested, that the true ground of the doubt was, that by the death of the principal the stipulated condition had become impossible to be performed without any default of the defendant. (v)

\* 2 East. P. C. c. 16. s. 155. p. 771.  
u Drinkwater's case, 1740, 1 Leach 15. 2  
East. P. C. c. 16. s. 155. p. 770. And see

Wild's case on the statute 5 Anne, c. 31. s. 6. ante, 1305.

v 2 East. P. C. c. 16. s. 155. p. 770.

There is also a case where the principal felon not only was not convicted, but was admitted as a witness against the party indicted for taking the reward; namely, the case of the notorious Jonathan Wild, whose extensive traffic in the taking of such rewards is said to have been the occasion of the passing of this clause in the statute. (*y*) The prisoner was first indicted on the statute 10 and 11 W. III. c. 23. for privately stealing a box of lace in a shop, and acquitted, \*upon its appearing from the testimony of one Kelly, who had actually stolen the box, and who was admitted as a witness for the crown, that the prisoner was not in the shop at the time, but only waited at the corner of the street to receive the goods; (*z*) but immediately upon this acquittal he was again arraigned, tried, and convicted, on the statute in question, 4 Geo. I. c. 11. s. 4. for receiving ten guineas from the owner of the shop as a reward for helping her to the box of lace so stolen by Kelly; and Kelly was again examined as a witness on the part of the crown on this indictment. (*a*)

The principal felon may be a witness against the party indicted for taking the reward.

[\*1320]

As a further means of putting a stop to this pernicious traffic in stolen goods, it is enacted by the statute 25 Geo. II. c. 36. s. 1. "that any person publicly advertising a reward with no questions asked, for the return of things which have been stolen or lost, or making use of any words in such public advertisement, purporting that such reward shall be given or paid without seizing or making inquiry after the person producing such thing so stolen or lost, or promising or offering, in any such public advertisement, to return to any pawnbroker, or other person, who may have bought or advanced money by way of loan upon such thing so stolen or lost, the money so paid or advanced, or any other sum of money or reward for the return of such thing; and any person printing or publishing such advertisement, shall respectively forfeit the sum of fifty pounds for every such offence, to any person who will sue for the same."

Advertising a reward, with no questions asked, &c. for the return of stolen goods, 25 Geo. II. c. 36. s. 1.

Having thus treated of the offence of receiving stolen goods in general, and having occasionally introduced in \*some of the former Chapters the clauses of several of the statutes which especially provide for the punishment of that offence in certain instances, (*b*) it remains only to mention those enactments of the legislature against the receivers of particular kinds of stolen property which have not been already noticed.

[\*1321]

*y* 4 Black. Com. 132.

*z* *Ante*, 1171, 1172.

*a* Wild's (Jonathan) case, 1725. 1 Leach 17. note (*a*). 2 East. P. C. c. 16. s. 155. p. 770. 4 Black. Com. 132. The prisoner was executed upon this conviction. See also as to the point of the principal felon be-

ing a witness, *ante*, Haslam's case, p. 1317.

*b* See, as to the receiving of stolen fish, *ante*, 1198, 1199; of stolen shrubs, plants, bark, &c. *ante*, 1104, *et sequ.*; of the contents of stolen letters, *ante*, 1261, *et sequ.*; of cloth and other manufactures, *ante*, 1285, *et sequ.*

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a Wild's (Jonathan) case, 1725. 1 Leach 37. s. c. (a) 2 East P. C. c. 16. s. 155 p. 770. 4 Black. Com. 132. The prisoner was executed upon this conviction. See above to the point of the principal felon be-

ing a witness, *ante*, Haslam's case, p. 1317.

b See, as to the receiving of stolen fish, *ante*, 1198, 1199, of stolen shrubs, plants, bark, &c. *ante*, 1104, *et sequ.*; of the contents of stolen letters, *ante*, 1261, *et sequ.*; of cloth and other manufactures, *ante*, 1285, *et sequ.*



\*gold; and then charged that the prisoner received the stolen watch, jewels, and gold plate above mentioned, knowingly against the form of the statute. The prisoner was convicted; but as the words "watch or watches" are omitted in the latter part of the statute, which makes the felony, judgment was respited, in order to take the opinion of the Judges, whether the receiving a gold watch and such seals, knowing them to have been stolen, (being taken by robbery on the highway) were a felony within the act? The point was debated by the Judges, and adjourned for further consideration, when ten of them who were present held the prisoner well convicted: and one of the absent Judges also concurred in this opinion. Some of the Judges thought the gold in the watch might be deemed *plate*; others thought that was not the meaning of the statute: but all held that the *seals* set in gold came under the word "jewels." (*a*)

"jewels" within this statute. *Qu.* as to a watch being within the statute.

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## \*CHAPTER THE TWENTY-FIFTH.

[\*1350]

*Of Receiving Stolen Lead, Iron, Copper, Brass, Bell-metal, Solder, and Pewter. (1)*

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## \*CHAPTER THE TWENTY-SIXTH.

[\*1360]

*Of Cheats, Frauds, False Tokens, and False Pretences. (2)*

**WHERE** the possession of goods is obtained, in the first instance, without fraud, upon a contract or trust, a subsequent dishonest conversion of them, while the privity of contract continues undetermined, will be only a breach of trust or civil injury, and not the subject of a criminal prose-

*a* Rex v. Moses, 1783. 2 East P. C. c. 16. s. 146. p. 734.

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(1) This chapter which relates wholly to the statutes of Great Britain is omitted.

**MAINE.**—In the case of *Cross & al. v. Peters*, 1 Greenl. Rep. 387, there is an exposition of the statutes of 33 H. 8. c. 1. and of 30 G. 2. c. 24. by Mellen C. J. The English and Massachusetts authorities are there referred to, and the former opinions adopted. The case of the Commonwealth v. Warren, 6 Mass. Rep. 72, was cited, and Mellen C. J. observes, "Had the statute of Massachusetts (Stat. 1815 ch. 136) been in force at the time of Warren's trial, he would probably have been convicted, as he used several false pretences, to obtain credit, by means of which his fraud was successful."

(2) **MASSACHUSETTS.**—It is not an indictable offence for a man under false



cution. (a) But where the party obtaining the goods has recourse to fraudulent means in the first instance, and thereby succeeds to the extent of inducing the owner not only to deliver the possession of the goods to him, but absolutely to *part with the property* in them, though such a taking will not, as we have seen, be considered as felonious

a 3 Inst. 107. 2 East. P. C. c. 16. s. 11. p. 693. *Ibid.* c. 18. s. 1. p. 816. *Ante.* 1088, 1089.

pretences, to get possession of a deed lodged in the hands of a third person as an escrow, in violation of his agreement. *Commonwealth v. Hearsay*, 1 Mass. Rep. 137. Nor is an *intention* to cheat, indictable at common law. *Commonwealth v. Moore*, 2 Mass. Rep. 139. At common law, it is an indictable offence, to cheat any man of his money, goods or chattels, by false tokens, or by using false weights and measures, but not by false *affirmations* only, without using any false tokens, weights or measures, and by no conspiracy; but the party cheated may pursue a civil remedy for the injury. The statute of 33 H. 8. c. 1. has been considered here as a part of our common law. The object of the law is to protect persons, who in their dealings use due diligence and precaution, and not those who suffer through their own credulity and negligence. But as prudent persons may be over-reached by means of false weights and measures, or by false tokens, or by a conspiracy, where two or more persons confederate to cheat, frauds effected in either of these ways are punishable by indictment. The English statute of 30 G. 2. c. 24. punishing cheats by false pretences, is not in force in this state. *Commonwealth v. Warren*, 6 Mass Rep. 72. ⚔ Since the case of the *Commonwealth v. Warren*, a statute has been passed in this state (1815 ch. 136) for the punishment of cheats by false pretences, which is a transcript of 30 G. 2. c. 24. By the second section of this statute, the Supreme Judicial Court, and the Municipal Court of the city of Boston, have exclusive jurisdiction of all gross frauds or cheats at common law. EDITOR.

NEW YORK.—To constitute a cheat or fraud at common law, the act must be such a fraud as would affect the public,—such a deception as common prudence cannot guard against it; as by using false weights or measures, or false tokens; or where there is a conspiracy to cheat. Where A. had a judgment against B., and B. came to A. and said he would settle it, by paying money in part, and giving a note for the residue; on which A. drew a receipt in full in discharge of the judgment, and B. got possession of the receipt without paying the money or giving the note; the indictment charged him with having obtained the receipt falsely, fraudulently and deceitfully, and under false arts, colours and pretences, and under pretence that he had the money in his pocket, and would pay it immediately and give his note for the residue, it was held upon these facts, that there was no *false token*, but only a false *assertion*, and that an indictment would not lie. There was a motion in arrest of judgment in this case, in support of which the following cases and authorities were cited. 2 Burr. 1125. 3 T. R. 104. 6 Mod. 42. *Sayer*, 146. 1 East's Rep. 185. 2 Stra 866. 6 T. R. 565. 2 East C. L. 816. 834. Against the motion were cited, Hawk. P. C. b. 1. 6. 71. s. 1. 4 Bla. Com. 157. 4 Com. Dig. Justices (B. 32, 33) 1 Sid. 312, 431. Comb. 16. 6 Mod. 175. 2 Ld. Raym. 1179. 6 Mod. 201. S. C. Noy's Rep. 103. Cr. Cir. Ass. 270. 3 Inst. 133, 4. 4 Bl. Com. 159. 160. Cr. Cir. Comp.

and amounting to larceny; (b) yet if effected by means of a false token, or a false pretence, it will come within the provisions of certain statutes, and be punishable as a misdemeanor. Besides the statutes also which relate to such offences, the common law provides for the punishment of many

*b. Ante* 1054 to 1067. And see the opinion of Eyre, B. on the debate in Pear's case, 2 East. P. C. c. 16. s. 112. p. 689, note (a)

288. 1 Leach, 161. *King v. Jones*. The court say, "In the present case we search in vain for the *false token*. There was nothing beyond the defendant's false assertion that he was ready to pay the judgment; there was not even the production of either note or money, and common prudence would have dictated the withholding the receipt until the money was paid, and the note drawn. To support this indictment would be to upset established principles." *The People v. Babcock*, 7 Johns. Rep. 201.

A person that obtains goods, under a pretence that he lived with, and was employed by A. B. who sent him for them, is indictable for obtaining goods by false pretences, under the statute sess. 36. c. 29. s. 13. The statute provides that if any person shall, knowingly and designedly, by false pretence, obtain any money, goods or chattels, &c. with intent to cheat or defraud any person, he shall be punished, &c. This is a transcript of the English statute of 30 G. 2. ch. 24. which according to the English decisions, has been considered as extending the common law offence of cheating, and as introducing a new rule of law. The statute of Geo. 2. is considered in England, as extending to every case where a party has obtained money or goods by falsely representing himself to be in a situation in which he was not, or by falsely representing any occurrence that had not happened, to which persons of ordinary caution might give credit. (3 T. R. 98.) The ingredients of the offence are, obtaining the goods by false pretences, and with an intent to defraud. If the false pretence produced the credit, it has been considered as bringing the case within the statute. (2 East. C. L. 830.) *The People v. Johnson*, 12 Johns. Rep. 292.

Where a person got possession of a promissory note by pretending that he wished to look at it, and then carried it away, and refused to deliver it to the holder, it was held that this was merely a private fraud, and not punishable criminally, according to the doctrine laid down in the case of the people *v. Babcock*, 7 Johns. Rep. 204. *Quere*. If the original intention was to take away the note, when delivered upon request, and to destroy or convert it to the party's own use, is it not felony? Editor.

PENNSYLVANIA.—It is an indictable offence in a public officer to impose false marks on stores provided for the army of the United States, whereby the public is injured. The defendant in this case was a baker employed by the army of the United States, and was indicted for a cheat in baking a number of barrels of bread, and marking them as weighing eighty-eight pounds each, whereas in fact they weighed only sixty-eight pounds. The defence was that false tokens are only indictable by the statute of 33 H. 8. c. 1. which had no operation in Pennsylvania, and 3 Burr. 1697. 1 Burn. 291. 2 Sess. Ca. 2. was cited. The answer by the Attorney General was that the defendant's office was a public trust; and he cited 3 Burr. 1125. 1 Hawk. 187. Of this opinion were the court. *Respublica v. Powell*, 1 Dall. 47.

An indictment may be maintained for a cheat of such a nature as may

of those cheats and frauds which may affect the public welfare. It has been holden that, in order to constitute a cheat properly so called, there must be a prejudice received, both at common law and under the statutes of 33 Hen. VIII. c. 1. and 30 Geo. II. c. 24. (c)

[\*1361] \*In treating of these offences we may consider; I. Of cheats and frauds punishable at common law. II. Of cheats and frauds by means of false tokens, and false pretences, within the statutes 33 Hen. VIII. c. 1. and 30 Geo. II. c. 24. extended by 52 Geo. III. c. 64: and, III. Of cheats and frauds punishable by other statutes.

## SECTION I.

### OF CHEATS AND FRAUDS PUNISHABLE AT COMMON LAW.

Cheats  
against  
public  
justice.

THOSE cheats which are levelled against the public justice of the kingdom are indictable at common law. (d) Judicial acts done without authority, in the name of another, are cheats of this description; but as they are generally attended by a *false personating* of some one, they will come under consideration in a subsequent chapter. (e) It may briefly be mentioned in this place, that with respect to a precedent of an indictment against a married woman, for pretending to be a widow, and as such executing a bail bond to the sheriff for one arrested on a bailable writ, it is observed, that perhaps this was considered as a fraud upon a public officer, in the course of justice. (f) And another case should be noticed, where, upon an application to the Court of King's Bench to discharge a defendant who had been holden to bail under a Judge's order, made upon an affidavit of debt sworn before a magistrate at *Paris*, the court desired that the counsel would speak upon the point, how far the making, or knowingly using such an affidavit, if false, was punishable. (g)

c Ward's case, 13 Geo. I. 2 Lord Raym. 1461. 2 Str. 747. 2 East. P. C. c. 19. s. 7. p. 860, 861.

d 2 East. P. C. c. 18. s. 4. p. 821.

e Post. Chap. xxxv.

f 2 East. P. C. c. 18. s. 4. p. 821. citing *Rex v. Blackburn*, M. 36 Car. II. Trem. P. C. 101. Cro. Circ. Comp. 78.

g The authorities referred to for the pur-

pose of shewing that it was punishable were 2 Hawk. P. C. c. 22. s. 1, 38, and 39, (which cites *Waterer v. Freeman*, Hob. 205, 266.) *Worsley v. Harrison*, Dy. 249, a. pl. 84. *Rex v. Mawby*, 6 T. R. 619, 635. *Rex v. Copley*, 7 T. R. 315, and 2 East. P. C. 821, which cites the authorities mentioned, ante, note (f).

prejudice others, though it does not charge, that any person was actually defrauded. Ibid.

Cheating with false dice, has been indicted and punished in Pennsylvania. Per M<sup>c</sup>Kean C. J. in *Respublica v. Teischer*. 1 Dall. 338.

And after argument Lord Ellenborough, \*C. J. said, that he had not the least doubt that any person making use of a false instrument, in order to pervert the course of justice, was guilty of an offence punishable by indictment. (h) In a former case it had been holden, that a person who, being committed to gaol under an attachment for a contempt in a civil cause, counterfeited a pretended discharge, as from his creditor, to the sheriff and gaoler, under which he obtained his discharge from gaol, was guilty of a cheat and misdemeanor at common law, in thus effecting an interruption to public justice ; although, the attachment not being for non-payment of money, the order was in itself a mere nullity, and no warrant to the sheriff for the discharge. (i)

Those frauds which affect the crown and the public at large, are also clearly the subject of indictment, though they may arise in the course of some particular transaction or contract with private individuals.

Frauds affecting the crown and public.

Amongst offences of this description, is the selling of *unwholesome provisions*. (k) And it is said, more largely, that the giving of any person unwholesome victuals, not fit for man to eat, *lucri causâ*, or from malice and decit, is undoubtedly, in itself, an indictable offence. (l)

Selling unwholesome provisions.

A case is reported, where the indictment against the defendant was, that he knowingly, wilfully, deceitfully, and maliciously did provide, furnish, and deliver to and for eight \*hundred French prisoners of war, whose names were unknown, and there being under the protection of the king, confined in a certain hospital, called Eastwood hospital, in the parish and county, &c., divers large quantities, to wit, five hundred pounds weight of bread, to be eaten as food, by the said French prisoners of war, such bread being then and there made and baked in an unwholesome and insufficient manner, and then and there being made of, and containing dirt, filth, and other pernicious and unwholesome materials and ingredients, not fit to be eaten by man ; and the said defendant then and there well knowing the said bread to be baked in an unwholesome and insufficient manner, and to be made of, and to contain dirt, filth, and other pernicious, and unwholesome materials, and ingredients, not fit to be eaten as aforesaid ; whereby the said prisoners of war did then and there eat of the said bread, and thereby then and there became distempered in their bodies, and injured and endangered in their healths ; to the great damage of the French prisoners, to the great discredit of our said lord the king, to the evil ex-

Treeve's case. Supplying prisoners [\*1363] of war, with unwholesome food, not fit to be eaten by man, holden to be an indictable offence.

*h* Omealy v. Newell, 8 East. 364. And his lordship that the case of the King v. Mawby, (*ante*, note g,) went the whole length of the proposition.

*i* Fawcett's case, York Spr. Ass. 1793. and East. T. 1793. 2 East. P. C. c. 19. s. 7.

p. 862. and s. 45. p. 952. See the case cited more at large, *Post*. Chap. xxvii. S. 2. upon the point of the offence being indictable as a forgery.

*k* 4 Black. Com. 162.

*l* 2 East. P. C. c. 18. s. 4. p. 822.

ample, &c. and against the peace, &c. (*m*) And the defendant having been convicted, it was objected, in arrest of judgment, that the offence as laid was not indictable; as it did not appear that what was done was in breach of any contract with the public, or of any moral or civil duty; and the judgment was respited to take the opinion of the Judges upon the point; when they all held the conviction right. (*n*) In this case, the defendant was a contractor with government, for the supplying of provisions to some of the French prisoners, then in this country: but the indictment did not state this fact; and it is observed, that it was not material to state it otherwise, than as matter of aggravation, if such a case wanted any; as there could be no doubt of the offence being in itself the subject of indictment, upon the principles already mentioned. (*o*)

[\*1364]

Dixon's case. Holden to be an indictable offence for a baker to sell bread containing alum in a shape which renders it noxious, although he gave directions to his servants to mix it up in a manner which would have rendered it harmless.

\*In a more recent case the indictment charged the defendant, a baker, with supplying to the royal military asylum at Chelsea, as and for good wholesome household loaves, divers loaves mixed with certain noxious ingredients, not fit for the food of man, which he well knew so to be at the time he so supplied them. It appeared in evidence that many of the loaves delivered by the defendant at the military asylum on a particular day, were strongly impregnated with *alum*, and that there were found in them several pieces of alum in its crystalline form as large as horse-beans: the tendency of alum to injure the health was also proved; and a statute 57 Geo. III. c. 98. s. 21. referred to, by which the use of alum, in the making of bread is prohibited under a penalty. On the part of the defendant it was proved that though he permitted alum to be used to assist the operation of the yeast, and to make the loaves look white; yet, that very great care was employed in the use of it; that it was first dissolved, and then used in such small quantities, and so equally distributed, as not to be capable of occasioning injury; and that if, on any particular occasion, the loaves delivered at this asylum had alum put into them in a different manner, it was quite contrary to the directions and intentions, and wholly without the knowledge or privity of the defendant. And it was contended that these facts completely negatived the averment in the indictment, that the defendant, at the time these loaves were delivered, well knew that they were not wholesome, and that they were unfit for the food of man: and it was urged that the defendant could not be criminally responsible for the acts of his servants. But by Lord Ellenborough, C. J. "Whoever introduces a substance into bread, which may be injurious to the health of those who

*m* There were eight other counts in the indictment, charging the offence to have been done at different times and in different prisons.

*n* Treeve's case, 1796. 2 East. P. C. c. 18. s. 4. p. 821.

*o* 2 East. P. C. c. 18. s. 4. *Ante* 1362.

consume it, is indictable, if the substance be found in the bread in that injurious form, although, if equally spread over the mass, it would have done no harm. If a baker will introduce such a substance into his bread, he must do it at his own hazard, and he must take especial care that the benefit he proposes to himself, does not produce mischief to others. He is engaged in an illegal act, \*and he must abide the consequences. [\*1365] The statute 37 Geo. III. c. 98. shews the judgment of the legislature with regard to alum, and a medical gentleman has given evidence as to its deleterious effects. If taken in very minute quantities it is innoxious. The same may be said of calomel, and even of arsenic. But would not a baker be answerable for selling bread having these substances mixed with it in a dangerous form, although he intended they should be so equally subdivided over the whole mass which he baked at one time, that no harm could follow? If the defendant was cognizant of the manner in which his business was carried on, and knew that alum was at all used in the making of the loaves sent to the military asylum, which are proved to have contained it to a very dangerous degree, he is guilty of this indictment." And the defendant was accordingly convicted. (p) The point was afterwards brought under the consideration of the Court of King's Bench, who concurred in the direction of Lord Ellenborough given at the trial; and Lord Ellenborough said, "He who deals in a perilous article must be wary how he deals; otherwise, if he observe not proper caution, he will be responsible." (q)

A case is reported where the Court of King's Bench held that the *mala praxis* of a physician is a great misdemeanor \*and offence at common law (whether it be for curiosity and experiment, or by neglect,) because it breaks the trust which the party has placed in the physician, and tends directly to his destruction. (r) *Mala praxis of a physician.* [\*1366]

In some cases the rendering false accounts and other frauds practised by persons in official situations, have been deemed offences so affecting the public as to be indictable. Thus, where two persons were indicted for enabling persons to pass their accounts with the pay office in such a way as to enable them to defraud the government; and it was objected *Rendering false accounts and other frauds by persons in official situations.*

p *Rex v. Dixon, cor. Lord Ellenborough, C. J., Guildhall, 1814, 4 Campb. 12.* See precedents for similar offences, 2 Chit. Crim. L. 556. *et sequ.* 2 Stark. Crim. Plead. 656.

q *Rex v. Dixon, 3 M. and S. 11.* And some exceptions to the indictment, taken in arrest of judgment, were overruled; and the court held that the indictment was sufficiently certain without shewing what the noxious materials were, or stating that the defendant intended to injure the children's health. Upon the last point Lord Ellenborough, C. J. said that it was an universal principle, that when a man is charg-

ed with doing an act, of which the probable consequence may be highly injurious, the intention is an inference of law resulting from doing the act; and that in this case it was alleged that the defendant delivered the loaves for the use and supply of the children, which could only mean for the children to eat; for otherwise they would not be for their use and supply. And see *Rex v. Bower, post. 1369, note (m).*

r *Dr. Groenvelt's case, 1697, 1 Ld. Raym. 213.*



that it was only a private matter of account, and not indictable; the court held otherwise, as it related to the public revenue. (s) And instances appear in the books of indictments against overseers of the poor for refusing to account, (f) and for rendering false accounts. (u) And a precedent is given of an indictment against a surveyor of the highways for converting to his own use gravel which had been dug at the expence of the inhabitants of the parish, and also for employing for his own private gain and emolument the labourers and teams of the parishioners, which he ought to have employed in repairing the highways. (x) A case is also mentioned of an application to the Court of King's Bench for an information against the minister and churchwardens of a parish, who had spent the larger part of a sum of money, collected by a brief for certain sufferers by fire, at tavern entertainments, and then returned, upon the back of the brief, that the smaller sum only was collected; and the court, though they refused the information, yet referred the prosecutors to the ordinary remedy by indictment. (y) A fraud committed by a parish officer, in procuring the marriage \*of a pauper, so as to throw the burden of maintaining such pauper on another parish, may also, as we have seen, be an indictable offence. (z) And several precedents are given of indictments for misdemeanors in procuring sick and impotent persons, standing in need of immediate relief, to be conveyed into parishes where they had no settlements, and in which they shortly afterwards died, thereby causing great expence to the inhabitants of such parishes. (a)

**False news.** It is said to have been resolved by all the judges that writers of *false news* are indictable and punishable: and that probably at this day the fabrication of news, likely to produce any public detriment, would be considered as criminal. (b)

**Fraud in an apprentice** Where an indictment charged that the defendant being an apprentice, and fraudulently intending to obtain money from the paymaster of a regiment, and to defraud the king, &c., procured himself to be enlisted as a soldier, without the consent of his master, by means whereof he fraudulently obtained from the paymaster divers sums of money, well knowing himself to be, without the consent of his master, disqualified from serving as a soldier, to the great deceit, fraud, &c., of the king, &c., it appears to have been admitted

s Rex v. Bembridge and Powell, cited 6 East. 136, ante 219, 220. 22 St. Tri. (by Howell) p. 1.

t Rex v. Commings and another, 5 Mod. 179. 1 Bott. 332.

u Rex v. Martin, 2 Campb. 269. 3 Chit. Crim. L. 701. 2 Nol. (2d ed.) 230. note (4.) Ante 218.

x 3 Chit. Crim. L. 666. et sequ.

y Rex v. The Minister, &c. of St. Botolph, 1 Black. Rep. 443.

z Ante, 216, Rex v. Tarrant, 4 Burr. 2106.

a 3 Chit. Crim. L. 693, et sequ. And see ante, 216, 217.

b Starkie on Lib. 546. citing 4 Read S. L. Dig. L. L. 23. Et vide Hale's Sum. 132, et per Scroggs, C. J., Rex v. Harris, at Guildhall, 1680. 7 St. Tri. (by Howell) 929, 930.

that this was an offence at common law. But the conviction was holden bad, on the ground that the necessary proof of the indenture of apprenticeship had not been given at the trial, there being two subscribing witnesses to the indenture, and neither of them having been produced. (c) The offence is now made punishable by a provision of the mutiny acts, which will be mentioned in the third section of this Chapter.

A case is mentioned where a person, falsely pretending \*that he had power to discharge soldiers, took money from a soldier to discharge him; and being indicted for this offence, the court held the indictment to be good. (d)

Falselypre-  
[\*1368]  
tending a  
power to  
discharge  
soldiers.

A curious species of fraud may be here mentioned. It is laid down in the books that, by the common law, if a person maim himself in order to have a more specious pretence for asking charity, or to prevent his being impressed as a sailor, or enlisted as a soldier, he may be indicted, and, on conviction, fined and imprisoned. (e)

Fraud by  
maiming in  
order to  
have a pre-  
tence to  
beg, &c.

Besides the offences which have been here mentioned, there are other instances of cheats clearly affecting the public, and therefore indictable; namely, such cheats as are affected by means of *false weights or measures*, which are considered as instruments or tokens purposely calculated for deceit, and by which the public in general may be imposed upon without any imputation of folly or negligence. And this reasoning is considered as applying to all cases where any species of false token is used which has the semblance of public authenticity: (f) as to a case where cloth was sold with the almeager's seal counterfeited thereon; (g) and to another case where a general seal or mark of the trade on cloth of a certain description and quality, was deceitfully counterfeited. (h) And the instances mentioned in the books of cheating by means of false dice, &c. (i) are referred to the same principle. (j)

Cheats by  
means of  
*false*  
*weights or*  
*measures.*

If, therefore, a person selling corn should measure it in a bushel short of the statute measure, or should measure it in a \*fair bushel, but put something into the bushel to help to fill it up, it seems that he might be indicted for the cheat. (k) And a precedent is given of an indictment against a baker, who had contracted with a guardian of the poor, in the city of

[\*1369]

c Jones's case, 1777. 1 Leach 174. 2 East. P. C. c. 18. s. 4. p. 822.

d Serlestead's, 1 Latch. 202.

e 1 Hawk. P. C. c. 55. *Of maiming, &c.* s. 4. 1 Hale 412, Co. Lit. 127 a. *Ante* 842, 843.

f 2 East. P. C. c. 18. s. 3. p. 820.

g Edwards's case, Trem. P. C. 103.

h Worrell's case, *Id.* 106. As to the deceitful making of linen cloth, see 3 Burn. Just. *Linen Cloth*, and 1 Eliz. c. 12. s. 1. And as to the deceitful working of woollen

cloth, see 5 Burn. Just. *Woollen Manufacture*.

i Leesor's case. Cro. Jac. 497. Maddock's case, 2 Roll. R. 107. 2 Roll. Ab. 78. The practice is now further punishable by penalties under the statutes 16 Car. II. c. 7. and 9 Anne, c. 14. See *ante*, 593 *et sequ.*

j 2 East. P. C. c. 18. s. 3. p. 820.

k *Per. Cur.* in Pinckney's case, 2 East. P. C. c. 18. s. 3. p. 820. As to the penalties for selling or buying corn otherwise than by the proper measure, see 1 Burn. Just. *Corn*.

Norwich, to supply bread for the use of the poor, for delivering bread deficient in weight. (*l*) And though the knowingly exposing to sale and selling wrought gold, under the sterling alloy, as and for gold of the true standard weight, was holden not to be an indictable offence, but a private imposition only in a common person, where no false weight or measure was used; (*m*) yet, if in such case the stamps or marks, required by statute on plate of a certain alloy, had been falsely used, it should seem that an indictment might have been sustained. (*n*) In the case in question the gold was not marked: and Aston, J., in giving his opinion, said that it was not selling by false measure, but only selling under the standard; and he cited a case in which it had been holden that selling coals under measure was not an indictable offence, but that selling them by false measure was. (*o*) And the result of the cases upon this subject appears to be that if a man sell by *false weights*, though only to one person, it is an indictable offence; but if without false weights

[\*1370] \*he sell to many persons a *less quantity* than he pretends to do, it is not indictable. (*p*)

But cheats or frauds effected in the course of private transactions between individuals, fall under a different consideration.

But though in the cases which have been thus mentioned an indictment may, and in most of them clearly is, maintainable as for a cheat or fraud at common law, on the ground that they consist of offences which affect, or may affect the public, being public in their nature, and calculated for the purposes of general fraud and deceit; yet, other cases, consisting of cheats or frauds effected in the course of private transactions between individuals, fall under a different consideration. This distinction, however, does not appear to have been at all times properly noticed: and, in a book of great authority, cheats, punishable at common law, are defined as “deceitful practices in defrauding or endeavouring to defraud another of his known right by means of some artful device contrary to the plain rules of common honesty.” (*q*) But this definition has been observed upon as not sufficiently distinct or accurate; and many of the authorities, from whence it seems to have originated, not in-

Unless they

1 2 Chit. Crim. L. 559. As to the assize of bread, &c. see 1 Burn. Just. *Bread*.

*m* Rex v. Bower, Cowp. 323. In this case the sale of the gold was by a servant of the defendant; but the court agreed that the master was responsible for the act of his servant done in the course of his employment, and within the scope of his authority. And see as to this point Rex v. Dixon, *ante* 1364. That it would be indictable in a *goldsmith* so to sell gold (under the statute) see 2 East. P. C. c. 18. s. 3. p. 820. and Cowp. 324.

*n* 2 East. P. C. c. 18. s. 3. p. 820. note (b). And see 1 East. P. C. c. 4. s. 34. p. 194. where it is said that offenders fraudulently

affixing public and authentic marks on goods of a value inferior to such tokens are liable to suffer at common law upon an indictment for a cheat.

*o* The case cited was Rex v. Lewis. And the learned Judge also cited Rex v. Wheatley, 2 Burr. 1125. *post.* 1377. See also Rex v. Driffeld, Say. 146.

*p* Per Buller J., in the case of Young and others, 3 T. R. 104. And see Rex v. Nicholson, cited in Rex v. Wheatley, 2 Burr. 1130. and Rex v. Dunnage, 2 Burr. 1130. Rex v. Driffeld, Say. 146.

*q* 1 Hawk. P. C. c. 71. s. 1

volving considerations, either of public justice, public trade, or public policy, have been said to be founded either in conspiracy or forgery, which are, in themselves, substantive offences, and the latter of which was usually, when successful, prosecuted as a cheat, before the various modern statutes, by which forgeries are, in so many instances, made capital offences. (r)

amount to conspiracy or forgery, which are substantive offences.

\*Thus the case mentioned where the suppression of a will was holden to be indictable as a cheat, (r) is said to have been probably a case of conspiracy or combination. (s) And the same explanation is given (t) of the case where several persons were indicted for causing an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it was written: (u) and also of the case of a person who was convicted upon a charge of having run a foot race fraudulently, and with a view to cheat a third person, by a previous understanding with the running competitor to win. (x)

[\*1371]

Cases of cheats amounting to conspiracy.

In another case of a cheat at common law, which has undergone considerable discussion, the indictment charged the two defendants, Macarty and Fordenborough, that they falsely and deceitfully intending to defraud one Chowne of divers goods, together deceitfully bargained with him to barter, sell, and exchange, a certain quantity of pretended wine, as good and true new Portugal wine, of him the said Fordenborough, for a certain quantity of hats, of him the said Chowne; and, upon such bartering, &c. the said Fordenborough pretended to be a merchant of London, and to trade as such in Portugal wines, when, in fact, he was no such merchant, nor traded as such in wines: and the said Macarty, on such bartering, &c. pretended to be a broker of London, when, in fact, he was not: and that Chowne, giving credit to the said fictitious assumptions, personating, and deceits, did barter, sell, and exchange, to Fordenborough, and did deliver to Macarty, as the broker between Chowne and Fordenborough, for the use of Fordenborough, a certain quantity of hats, of such a value, for so many hogsheads of the pretended new Portugal wine; and that Macarty and \*Fordenborough, on such bartering, &c. affirmed that it was true new Lisbon wine of Portugal, and was the wine of Fordenborough, when, in fact, it was not Por-

Macarty and Fordenborough's case. Cheat effected by a conspiracy; where one person pretended to be a merchant, and the other a broker; and, as such, bartered bad wine for hats.

[\*1372]

r 2 East. P. C. c. 18. s. 2 *et sequ.* p. 817. *et sequ.* The distinction between forgery and the general class of cheats was well settled in Ward's case, Hil. T. 13 G. 1. 2 Ld. Raym. 1461. 2 Str. 747. 2 East. P. C. c. 19. s. 7. p. 860, 861. It was there shewn to be immaterial to the offence of forgery, properly so called, whether any person were prejudiced or not, provided any might have been prejudiced: but that to constitute a cheat, properly so called, there must be a prejudice received both at common law, and under the

statutes 33 H. VIII. c. 1., and 30 Geo. II. c. 24.

r 1 Hawk. P. C. c. 71. s. 1. citing *Rex v. Breerton and others*, Noy. 103.

s 2 East. P. C. c. 18. s. 5. p. 823.

t *Id. Ibid.*

u *Rex v. Skerrett and others*, 1 Sid. 212., cited in 1 Hawk. P. C. c. 71. s. 1. and *Rex v. Paris and others*, 1 Sid. 431.

x *Rex v. Orbell*, 6 Mod. 42., cited in the note to 1 Hawk. P. C. c. 71. s. 1.

tugal wine, nor was it drinkable or wholesome, nor did it belong to Fordenborough; to the great deceit and damage of the said Chowne, and against the peace, &c. (y) Upon this case considerable doubts were entertained; but it seems that, ultimately, judgment was given for the crown, and that the true ground of such judgment was, that it was a case of *conspiracy*. (z) And, even if it were not a case of conspiracy; yet, as the cheat was effected by means of bartering pretended port wine, which the indictment alleged was not wholesome, or fit to drink, the vending of such an article for drinking was clearly indictable; (a) and within the principle already mentioned, of cheats or frauds, by which the public may be affected. (b)

Govers's case. Cheat effected by means of a forged instrument.

[\*1373]

In one of the principal cases where the cheat was effected by means of a *forged instrument*, the indictment charged that the defendant, intending to cheat J. S., did deceitfully take upon himself the stile and character of a merchant, and did deceitfully affirm to J. S. that he was a merchant, and had received divers commissions from Spain; and, in order to induce J. S. to believe the same, and to give him credit, the defendant deceitfully produced to J. S. *several paper writings, which he falsely affirmed to be letters from Spain, containing commissions for jewels, watches, and other goods, to the amount of 4000*l.*, by means whereof the defendant got into his hands two watches, the property of J. S. whereas, in truth, the defendant was not a merchant; and the paper writings, containing such commissions, were false and counterfeit.* And it does not appear that the indictment concluded against the form of the statute, though the false tokens made use of came directly within the stat. 33 Hen. VIII. c. 1. (c) But it is observed, that if this were sustained as an indictment at common law, the fraud being practised in a private transaction, and the false tokens mere private letters, having no semblance of public authenticity, the only ground on which the judgment can be maintained, without going the length of saying that the stat. of 33 Hen. VIII. c. 1. was merely declaratory of the common law, is, that the cheat was effected by means of a *forgery*, (in which all are principals at common law;) and that the publication of such forged instru-

y Reg. r. Macarty and Fordenborough, 2 Lord Raym. 1179, 3 Ld. Raym. 487. 2 Burr. 1129.

z 2 Ld. Raym. 1184. 2 Burr. 1129. 2 East. P. C. c. 18. s. 1. p. 824. Upon a recent discussion of this case, (in Rex v. Southerton, 6 East. 133,) it was objected to such construction that the word *conspired*, was not in the indictment; but in 2 East. P. C. *ub. supr.* it is said that, though the indictment did not charge that the defendants *conspired, co-nomine*, yet it charged that they, *together, &c. did the acts* imputed to them; which might be considered to be tantamount.

a By Lord Ellenborough, C. J., in Rex v. Southerton, 6 East. Rep. 133.

b *Ante*, 1362, *et sequ.* The sale of corrupted wine, contagious or unwholesome flesh, &c. is prohibited by an ancient statute, 51 Hen. III. stat. 6., and the ordinance for bakers, c. 7. under severe penalties. And, by the stat. 12 Car. II. c. 25. s. 11. any brewing or adulteration of wine is punished with the forfeiture of 100*l.* if done by the wholesale merchant, and 40*l.* if done by the vintner, or actual trader. See 4 Black. Com. 162.

c Rex v. Govers, 2 Say. 206. 2 East. P. C. c. 18. s. 6. p. 824, 825.

ments, for the purpose of deceit, was in itself a substantive offence, indictable at common law. (d) And, in a case where the defendant was indicted for falsely and deceitfully obtaining 450*l.* from one W. Harle, by a false token, viz. a promissory note, in the name of R. Hales, payable to J. E., &c. with a counterfeit indorsement thereon, the jury were directed that they must find the defendant guilty if it appeared to be a forged instrument; the instrument being a false token. (e) But a forgery could not, it seems, be prosecuted at common law as a cheat, unless it were successful; as in a case where the defendant was convicted of forgery at common law of an acquittance, the \*court said, that there was no reason why the offence should not be punished as a forgery, as well as if the thing fabricated had been a deed, but that it could not be prosecuted as a cheat at common law without an *actual prejudice*, which was an *obtaining* on the statute 33 Hen. VIII. (f)

Other cases of forgeries prosecuted as cheats at common law.

[\*1374]

It does not appear, therefore, that these cases, when duly examined, are contrary to that which has been given as a more accurate definition of cheats and frauds, punishable at common law; namely, "The fraudulent obtaining the property of another, by any deceitful and illegal practice or token, (short of felony,) which affects or may affect the public." (g) And there are many cases by which it is supported; tending to show, that a cheat or fraud, effected by an unfair dealing and imposition on an individual, in a private transaction between the parties, cannot be the subject of an indictment at common law.

The more accurate definition of cheats, &c. at common law describes them as affecting the public.

In several of these cases of impositions upon individuals in private transactions, which have been holden not to be indictable, the cheat was effected by a mere false affirmation, or bare lie. Thus an indictment was quashed, upon motion, which charged the defendant with selling at market a sack of corn, which he falsely affirmed to be a Winchester bushel, whereas it was greatly deficient; and the court said, that this was no more than telling a lie. (h) And an indictment was also quashed which charged the defendant with selling to a person eight hundred weight of gum, at the price of seven pounds by the hundred weight, falsely pretending and affirming that the gum was gum seneca, and that it was worth seven pounds by the hundred weight; whereas, in \*truth, the gum was not gum seneca, but a gum of an inferior kind, and was not worth more than three pounds by the hun-

Cheats by means of a bare lie, or false affirmation in a private transaction, holden not to be indictable.

[\*1375]

d 2 East. P. C. c. 18. s. 6. p. 825.

e Hales's case, cor. Pengelly, C. B., and other judges, 1729. 9 St. Tri. 75. 2 East. P. C. c. 18. s. 6. p. 825. : a case of misdemeanor at common law, before the statute making the offence felony.

f Ward's case, 2 Str. 749. And see further the authorities collected upon this subject

in 2 East. P. C. c. 18. s. 2. p. 817, note (a), and *Id.* s. 6. p. 825.

g 2 East. P. C. c. 18. s. 2. p. 818.

h Pinkney's case, 2 East. P. C. c. 18. s. 2. p. 818., cited in 2 Burr. 1129. But see *ante* 1368; that this case might have come under a different consideration if the vendor had fraudulently *measured* the corn.



dred weight. (i) And a case was holden not to be indictable where the defendant obtained money of another, by pretending that he was sent by a third person for it: and Holt, C. J. said, "Shall we indict one man for making a fool of another? Let him bring his action." (k) In another case the indictment set forth, that the defendant came to the shop of a mercer, and affirmed that she was a servant to the Countess of Pomfret, and was sent by her from St. James's to fetch silks for the queen, endeavouring thereby to defraud the mercer; whereas, in fact, she was no servant of the Countess of Pomfret, nor was sent upon the queen's account: and it was moved in arrest of judgment that this was not an indictable offence, there being no false token, nor any actual fraud committed; and the court arrested the judgment, saying that the case was no more than telling a lie. (l)

And the same construction will prevail, though an apparent token be used, if it be of no more credit than the party's own assertion. *Lara's case*; where the defendant gave a check upon his banker, which he knew he had no authority to draw, and that it would not be paid.

And it appears that the same construction will prevail, though the defendant make use of an apparent token; which in reality is, upon the very face of it, of no more credit \*than his own assertion. (m) An indictment at common law charged that the defendant, deceitfully intending, by crafty means and devices, to obtain possession of certain lottery tickets, the property of A., pretended that he wanted to purchase them for a valuable consideration, and delivered to A. a fictitious order, for payment of money subscribed by him, the defendant, &c. purporting to be a draft upon his banker for the amount, which he knew he had no authority to draw, and that it would not be paid; but which he falsely pretended to be a good order, and that he had money in the banker's hands, and that it would be paid; by virtue of which he obtained possession of tickets, and defrauded the prosecutor of the value. And the defendant having been convicted, the Court of King's Bench arrested the judgment. Grose, J. said, "That, in order to make this case something more than a bare naked lie, it had been said that the defendant used a false token, for that he gave a check on his banker; but that was only adding another lie; and that if the court should determine that this case was indictable, he did not know how to draw the line; for it might equally be said that every person who overdrew his

z *Rex v. Lewis*, Say. 205. Indictments quashed upon motion may be considered as authorities; but no stress can be laid on several cases to be found in the books, particularly in *Mod. Rep.*, where indictments of this kind were refused to be quashed upon motion, because it was the practice of the court, as often declared, not to quash on motion indictments for offences founded in fraud or oppression, but leave the defendants to plead; 2 *East. P. C. c. 18. s. 2. p. 818. note (a).* citing 5 *Mod. 13.* 6 *Mod. 42.* 12. *Mod. 49.*

k *Reg. v. Jones*, 1 *Salk. 379.* 2 *Ld. Raym. 1013.* And see also *Reg. v. Hannon*, 6 *Mod.*

311, and 2 *Hawk. P. C. c. 71. s. 2*; and *Nehuff's case*, *Salk. 151.*, where the defendant borrowed 600*l.* of a feme covert, and promised to send her fine cloth and gold dust, as a pledge, and sent no gold dust, but some coarse cloth, worth little or nothing; and the court said that it was not a matter criminal, and that it was the prosecutor's fault to repose such a confidence in the defendant.

l *Bryan's case*, 2 *Str. 886.* In the case as cited in 2 *East. P. C. c. 18. s. 2. p. 819.*, it is said that the defendant obtained the goods.

m 2 *East. P. C. c. 18. s. 2. p. 819.*

banker used a false token, and might be indicted for it." Lawrence, J. said, "It is admitted that a mere false assertion, unaccompanied by a recommendation, is not indictable; and, I think, there is nothing in this case beyond the defendant's own false assertion." (u) So in a case where the defendant, a brewer, was indicted for a cheat, in sending to the keeper of an alehouse so many vessels of ale, marked as containing such a measure, and writing a letter to him, assuring him that they did contain that measure, when, in fact, they did not contain such measure, but so much less, &c.; the indictment was quashed upon a motion, after argument, as containing no criminal charge. (o) Foster, J. indeed doubted concerning this case when it was cited, because it seemed to him that the vessels being marked as containing a greater quantity than they really did, were false tokens. (p) But as it does not appear that cheating, by means of mere private or privy tokens, was punishable at common law, without the aid of the statute 33 Hen. VIII. c. 1. (q) it is well observed, upon this doubt of the learned Judge, that possibly the court, in deciding the case, thought that those marks, not having even the semblance of any public authority, but being merely the private marks of the dealer, did, in effect, resolve themselves into no more than the dealer's own affirmation, that the vessels contained the quantity for which they were marked. (r)

Where an indictment charged the defendant; for that he, keeping a common grist-mill, and being employed by one Bare to grind three bushels of wheat, did, with force and arms, unlawfully take and detain forty-two pounds weight of wheat: judgment was given for the defendant upon a demurrer, there being no actual price laid, nor any charge of taking as for unreasonable toll; and it being a matter of a private nature, for which an action would lie. (s)

The following case has been considered to have clearly established the true boundary between those frauds that are, and those that are not indictable at common law. (t) The defendant, a brewer, was charged, by an indictment at common law, for that he intending to deceive and defraud one Richard Webb, of his money; falsely, fraudulently, and deceitfully, sold and delivered to him sixteen gallons of \*amber, for and as eighteen gallons of the same liquor, and received fifteen shillings, as for eighteen gallons, knowing there were only sixteen gallons. And this was holden clearly not to be

Wilders's case: where the defendant sent vessels of ale marked, as containing a certain measure; and wrote a letter, affirming that the vessels did contain such measure. [\*1377]

Channell's case. The defendant was charged with detaining corn; holden to be of private nature, not indictable.

Wheatley's case. Selling sixteen gallons of liquor instead of eighteen, holden to be only an unfair dealing, and imposi- [\*1378]

u Rex v. Lara, 1796, 6. T. R. 565, 2 Leach 552. 2 East, P. C. c. 18. s. 2. p. 619. But see in Rex v. Jackson, *post*, a different doctrine laid down upon an indictment on the stat. 36 Geo. II. c. 24. as to a check drawn on a banker with whom the party keeps no cash.  
o Rex v. Wilders, cited by Ld. Mansfield, and supplied by Donson, J. in Rex v. Wheatley, 2 Burr. 1124.

p 2 Burr. 1129.

q 2 East, P. C. c. 18. s. 9. p. 633, 634.

r 2 East, P. C. c. 18. s. 3. p. 620.

s Channell's case, 2 Str. 793. 2 East, P. C. c. 18. s. 2. p. 618. And see Rex v. Haynes, *post*, 1378.

t By Ld. Kenyon, C. J., in Lara's case, 6 T. R. 569.

tion on an individual, and not an indictable offence at common law.

an indictable offence, but only a civil injury, for which an action lay to recover damages. Lord Mansfield, C. J. said, "It amounts only to an unfair dealing, and an imposition on this particular man, by which he could not have suffered but from his own carelessness, in not measuring the liquor when he received it; whereas fraud, to be the object of criminal prosecution, must be of that kind which, in its nature, is calculated to defraud numbers, as false weights or measures, false tokens, or where there is a conspiracy." (u)

The doctrine that an indictment for a cheat at common law, cannot be maintained upon a mere false affirmation, has been subsequently recognized. (x)

Haynes's case. The doctrine of a transaction in the nature of an unfair dealing and imposition upon a particular individual, not being indictable at common law, further established in this case; where a [\*1379] miller was charged with receiving good barley to grind at his mill, and delivering meal in return different from the produce of the barley, and musty, &c.; and it was holden not to be indictable.

And in a case of very recent occurrence, the doctrine of a transaction in the nature of an unfair dealing, and imposition upon any particular individual, not being an indictable offence at common law, was still further established. The indictment, in substance, charged the defendant, a miller, with receiving good barley to grind at his mill, and delivering a mixture of oat and barley meal, different from the produce of the barley, and which was musty and unwholesome: and the defendant having been found guilty, it was assigned for error, amongst other things, that no indictable offence was charged against him. As to one of the grounds upon which it was contended that the offence charged was not indictable, namely, that the statement should have been, that the defendant delivered the barley "to be eaten as for food," and that it was "not fit to be eaten by man;" (y) Lord Ellenborough, C. J. said, that \*if the indictment had alleged that the defendant delivered the barley as an article for the food of man, it might possibly have been sustained; but that he could not say that its being musty and unwholesome necessarily, and *ex vi termini*, imported that it was for the food of man; and it was not stated that it was to be used for the sustentation of man, only that it was a mixture of oat and barley-meal. As to the other point, that this was not an indictable offence, because it respected a matter transacted in the course of trade, and where no tokens were exhibited by which the party acquired any greater degree of credit; his lordship said that, if the case had been that this miller was owner of a soke mill, to which the inhabitants of the vicinage were bound to resort, in order to get their corn ground, and that the miller, abusing the confidence of this his situation, had made it a colour for practising a fraud, this might have presented a different aspect: but, as it then stood, it seemed to be no more than the case of a common tradesman who was guilty of a fraud in a matter of trade or dealing, such as was ad-

u Wheatley's case, 2 Burr. 1125. 1 Black. Rep. 273. 2 East, P. C. c. 18. s. 2. p. 818. And see *ante*, 1370 *et sequ.*

x By Ld. Kenyon, C. J., in *Rex v. Gibbs*, 1 East, R. 135.

y See Treeve's case. *ante* 1362.

verted to in *Rex v. Wheatley*, and the other cases, as not being indictable. (z)

Again in a still more recent case where the indictment against the defendants was for a conspiracy to cheat and defraud the prosecutor by selling him an unsound horse; and the case did not, upon the evidence, assume the shape of a conspiracy; Lord Ellenborough, C. J., said, that if such a transaction were to be considered as an indictable offence, then, instead of all the actions which had been brought on \*warranties, the defendants ought to have been indicted as cheats: and that no indictment in a case like this could be maintained, without evidence of concert between the parties to effectuate a fraud. And the defendants were, accordingly, acquitted. (a)

Pywell's case. Selling an unsound horse not indictable.

[\*1380]

These cases seem sufficiently to support the definition above adopted, (b) and to shew that the cheat or fraud must be effected by some deceitful and illegal practice or token, *which affects, or may affect the public*, in order to be indictable at common law. And it seems also to result from these cases that a cheat or fraud, in order to be punishable by the common law, must be such against which common prudence could not have guarded. (c) Indeed it can hardly be supposed that a cheat will much affect the public which is open to the detection of any man of common prudence.

With respect to the indictment for a cheat or fraud at common law, it may be briefly observed that where the transaction has been effected by false tokens, and the offence is so charged, it is necessary to specify and set forth what the false tokens were; and it is not sufficient to allege generally that the cheat was effected by certain false tokens or false pretences. (d) But it does not seem to be necessary to describe them more particularly than they were shewn or described to the party at the time, and in consequence of which he was imposed upon; and it is also said not to be necessary to make any express allegation that the facts set forth shew a false token. (e) An objection appears to have been made to one of the counts of an indictment for a cheat at common law that it charged the false pretence to have been made to one \*person and the deceit to have been practised on a different person. (f)

Indictment.

[\*1381]

z *Rex v. Haynes*, 4 M. & S. 214. *Qu.* therefore the case of *Rex v. Wood*, 1 Sess. Cas. 217. where the defendant, being a miller, and indicted for *changing* corn delivered to him to be ground, and giving bad corn instead of it; a motion was made to quash the indictment, because the transaction was only a private cheat, and not of a public nature; but it was answered that, being a cheat in the way of trade, it concerned the public; and the court were unanimous not to quash it. And see the observations as to the authority of cases of this kind, in which the

court refused to quash the indictment, *ante*, 1375, note (i).

a *Rex v. Pywell and others*, 1 Stark. R. 402.

b *Ante* 1374.

c 1 Hawk. P. C. c. 71. s. 1, 2. *Rex v. Wheatley*, 2 Burr. 1125, *ante* 1377. By Fielding *arguend.* in the case of *Young and others*, 3 T. R. 99. assented to by Buller J., *Id.* 104.

d 2 East. P. C. c. 18. s. 13. p. 837.

e 2 East. P. C. c. 18. s. 13. p. 838.

f *Lara's case*, 2 Leach 647.

False-  
token.

The punishment of this offence at common law is, as in other cases of misdemeanour, by fine, imprisonment; or further by infamous corporal pain, in aggravated cases. (g)

## SECTION II

OF CHEATS AND FRAUDS BY MEANS OF FALSE TOKENS AND FALSE PRETEXTS, WITHIN THE STATUTES 35 H. VIII. c. 1. AND 30 G. II. c. 24. EXTENDED BY 52 G. III. c. 64.

35 H. VIII.  
c. 1. s. 1.  
recites the  
mischief  
of cheats  
by privy  
tokens and  
counterfeit  
letters in  
other  
men's  
names:

And enacts  
that per-  
sons con-  
victed of  
such cheats  
shall be  
punished  
[\*1382]  
by impris-  
onment,  
&c.

THE statute 35 H. VIII. c. 1. s. 1. entitled "an act concerning counterfeit letters or privy tokens to receive money or goods in other men's names," recites "that evil-disposed persons had of late falsely and deceitfully contrived devised and imagined privy tokens. and counterfeit letters in other men's names, unto divers persons their special friends and acquaintances, for the obtaining money goods chattels and jewels of the same persons, their friends and acquaintances, by colour whereof the said light and evil-disposed persons had deceitfully and unlawfully obtained and gotten great substance of money goods chattels and jewels into their hands and possession, contrary to right and conscience," and enacts, that if any person or persons, of "what estate or degree soever he or they be, falsely and deceitfully obtain or get into his or their hands or possession, any money goods chattels jewels or other things of any other person or persons, by colour and means of any such false token or counterfeit letter made in any other \*man's name, as is aforesaid, that then every person and persons so offending. and being thereof lawfully convict," by witnesses taken before the Lord Chancellor, or by examination of witnesses, or confession taken before the justices of assize in their circuits, or before the justices of peace in their general sessions, or by action in any of the king's courts of record, shall have and suffer such correction and punishment, by imprisonment setting upon the pillory (h) or otherwise, by any corporal pain, except pains of death, as as shall be adjudged by the person before whom they shall be convicted. The statute then authorizes justices of assize, and also two justices of the peace, one to be of the *quorum*, to commit or bail offenders to the assizes or general sessions: (i) and saves to the party grieved his civil remedy by action, &c. for the property obtained. (k)

30 Geo. II. The statute 30 Geo. II. c. 24. s. 1. recites that evil-dis-

g 1 Hawk. P. C. c. 71. s. 3. 2 East. P. C. c. 10. s. 13. p. 838.

h As to the abolition of this punishment,

except in cases of perjury, &c., see 56 Geo. III. c. 138, *ante*, 211, note, (n)

i S. 3.

k S. 4.



posed persons had, by various subtle stratagems, &c. fraudulently obtained divers sums of money, goods, wares, &c. to the great injury of industrious families, and to the manifest prejudice of trade and credit; and enacts, "that all persons who knowingly and designedly, by false pretence or pretences, shall obtain from any person or persons, money, goods, wares, or merchandizes, with intent to cheat or defraud any person or persons of the same; shall be deemed offenders against law and the public peace;" and the court before whom such offenders shall be tried shall, in case of their conviction, order them to be fined and imprisoned, or to be put in the pillory, (l) or publicly whipped, or to be transported (according to the laws for the transportation of felons) for the term of seven years, as the court shall think fit. The second section enacts that any justice of peace, before whom any person charged on oath with any such offence shall be brought, may commit or \*bail the party to answer the complaint at the next general or quarter sessions of the peace, or next sessions of oyer and terminer; and shall bind over the prosecutor by recognizance in a reasonable sum to prosecute, or in a sum not less than double the amount of the money or goods fraudulently obtained, if they shall exceed 20*l.* in value. By a subsequent section it is enacted that no *certiorari* shall be granted to remove any indictment, &c., had in pursuance of the act. (m)

c. 24. s. 1. recites the mischief of persons obtaining money, &c. by stratagem, &c. and enacts, that persons obtaining money, goods, &c. by false pretences, shall be punished by fine, imprisonment, whipping, or transportation for seven years. [\*1383]

The statute 52 Geo. III. c. 64. recites the 30 Geo. II. c. 24., and that it is expedient that the provisions of the said act should be further extended; and then enacts, "That all persons who knowingly and designedly, by false pretence or pretences, shall obtain from any person or persons, or from any body politic or corporate, any money, goods, wares, or merchandizes, or any bond, bill of exchange, bank note, promissory note, or other security for the payment of money, or any warrant or order for the payment of money or delivery or transfer of goods or other valuable thing, with intent to cheat or defraud any person or persons, or any body politic or corporate of the same, shall be deemed offenders against law and the public peace, and shall be liable to be prosecuted and punished in like manner as if they had knowingly and designedly, by false pretence or pretences, obtained money, goods, wares or merchandizes, from any person or persons with intent to cheat or defraud any person or persons of the same."

52 Geo. III. c. 64. extends the 30 Geo. II. c. 24 to persons obtaining, by false pretences, any bond, bill, note, security, warrant, &c. or other valuable thing.

Upon the construction of these statutes it may be first observed that, though, as far as relates to such cheats as amounted to *forgeries* at common law, the statute 33 Hen. VIII. c. 1. seems not to have created any new offence; (n)

Construction of these statutes.

<sup>l</sup> See *ante*, note (h)

<sup>m</sup> S. 20. Smith's case. Cowp. 34. 1. Chit. Crim. L. 377.

<sup>n</sup> Ward's case, 2 Lord Raym. 1466. O'Brian's case, 7 Mod. 378. 2 East. P. C. c. 18. s. 9. p. 832.



\*yet from the statements in the title and reciting part of that statute, the object of it seems to have been to reach such frauds as were accomplished by means of *privy* tokens, made in other men's names: (*o*) and such therefore as might, in many cases, be deemed not sufficiently to affect the public to be made the subject of criminal prosecution at common law. (*p*) It is, on all hands, admitted that the 30 Geo. II. c. 24. was introductive of a new law. (*q*)

Meaning of  
the words  
false  
"privy  
token."

It has been generally considered that a false "*privy token*," within the statute 33 Hen. VIII. c. 1. must be some real visible mark or thing, as a key, a ring, &c.; and that it must be calculated to gain the party using it some additional credit and confidence beyond his own assertions; and not merely a false affirmation. If *writings*, therefore, be the tokens made use of, they must be such as are made in the names of third persons. (*r*) And the false token must be used, and the property obtained thereby, in order to bring a case within the statute. (*s*)

As to the  
credit be-  
ing obtain-  
ed in the  
name of a  
third per-  
son.

[\*1385] It was the opinion of seven of the judges, that the stat. 33 Hen. VIII. c. 1. was confined to cases of obtaining goods "in other men's names, by false tokens or counterfeit letters," made in any other man's name; and that the statute 30 Geo. II. c. 24. extended that law to all cases where goods were obtained by false pretences of any kind: but that both these statutes were confined to cases where the credit was obtained *in the name of a third person*, and did not extend \*to cases where a man, on his own account, got goods *with an intention to steal them*. (*t*) The latter branch of this opinion is admitted as undoubtedly true, as to both the statutes, in the sense in which it was applied by the judges, in distinguishing cases of larceny from cheats. (*u*) But with respect to the former branch of it, though supported as to the 33 Hen. VIII. c. 1. by the express words of that statute, which speaks of *privy* tokens and counterfeit letters, "in other men's names;" yet it is observed that the terms of the 30 Geo. II. c. 24. are much more general, and do not contain any such restrictive words. (*x*) And it is further observed, that the 30 Geo. II. c. 24. was purposely passed in order to supply the deficiencies of the 32 Hen. VIII. c. 1. and that the interpretation in question seems scarcely con-

*o* 2 East. P. C. c. 18. s. 9. p. 833.

*p* *Ante*, 1374, *et sequ.*

*q* 2 East. P. C. c. 18. s. 9. p. 834.  
Young and others, (case of,) 3 T. R. 104.  
*post.* 1385.

*r* 2 East. P. C. c. 18. s. 7. p. 827. And  
see *Rex v. Lara*, *ante*, 1376. *Rex v. Wilders*,  
*ante*, *ibid.* as to mere false affirmation. And  
in *Rex v. Munos*, 2 Str. 1127. 1 Hawk. P.  
C. c. 71. s. 9., where one man went to the  
house of another, and pretended that such a

person had sent him to receive twenty pounds,  
and received it, whereas such person did not  
send him, it was holden not to be an offence  
within this statute.

*s* *Rex v. Brian*, 2 Sess. Cas. 27. 1 Hawk.  
P. C. c. 71. s. 11.

*t* *Pear's case*, 2 East. P. C. c. 16. s. 112.  
p. 689.

*u* 2 East. P. C. c. 18. s. 9. p. 832.

*x* *Id. Ibid.*

sistent with the doctrines laid down in several decided cases. (y)

The statute 30 Geo. II. c. 24. only enlarges the description of the offence in the statute 33 Hen. VIII. c. 1. Both statutes are made *in pari materiâ*; and whatever has been determined in the construction of one of them is a sound rule of construction for the other. (z)

The following is an important case, in which the construction of these statutes received great explanation.

The indictment was framed on the statute 30 Geo. II. c. 24.; and the first count charged that the four defendants, Young, Randal, Mullins, and Osmer, fraudulently intending to obtain the money of the king's subjects, by false colours and pretences, unlawfully and knowingly, &c. did falsely pretend to one Thomas, that Young had made a bet of five hundred guineas on each side, with a colonel in the \*army, then at Bath, that one Wm. Lewis would, on the next day, run on the high road, leading from Gloucester to Bristol, ten miles in length, within one hour; and that Young and Mullins did go two hundred guineas each in the bet, and Randal did go the other hundred guineas: and that, under colour and pretence of such bet, they obtained from Thomas, as a part of such pretended bet, twenty guineas of the five hundred guineas; by which said false pretences the defendants unlawfully, &c. obtained from the said Thomas the said twenty guineas, with intent to cheat and defraud him thereof; whereas, in truth, no such bet had been made, &c. against the form of the statute, &c. A second count stated the bet to have been made between Young and Osmer. The defendants having been found guilty, this indictment was removed by writ of error into the Court of King's Bench, and several errors assigned; one of which was, that the supposed false pretences shewn in the first and second counts were neither contrary to the statute 33 Hen. VIII. c. 1., or the 30 Geo. II. c. 24., or any other statute. And it was argued that the transaction itself was not the subject matter of a criminal prosecution, for that it did not affect the public; and that it was one against which common prudence might have guarded: for, as it was the representation of a *future* transaction, the party had an opportunity of inquiring into the truth of it, and therefore it was his own fault if he were deceived: but the objection was overruled. Lord Kenyon, C. J. said, "Undoubtedly this indictment, being founded on the statute of 30 Geo. II. c. 24., is different from a common law indictment. When it passed, it was considered to extend to every case where a party had obtained money by falsely representing himself to be

The 33 Hen. VIII. c. 1. and the 30 Geo. II. c. 24. made *in pari materiâ*.

Young and others (case of,) Indictment on the 30 Geo. II. c. 24. for obtaining [\*1386] money under the false pretence of sharing a supposed bet, said to have been before laid with another; and which was to be decided the next day.

y *Id. ibid.* See Young's case, *post.*; and Witchell's case, *post.* 1390.

z Per Buller, J. in *Rex v. Mason*, 2 T. R. 586.

in a situation in which he was not, or any occurrence that had not happened, to which persons of ordinary caution might give credit. The statute of 33 Hen. VIII. c. 1. requires a false seal, or token, to be used in order to bring the person imposed upon into the confidence of the other; but that being found to be insufficient, the statute 30 Geo. II. c. 24. introduced another offence, describing it in terms

[\*1387] *\*extremely general.* It seems difficult to draw the line, and to say to what cases this statute shall extend; and therefore we must see whether each particular case, as it arises, comes within it." His lordship then adverted to the facts of the case before the court; and after saying that the defendants, morally speaking, had been guilty of an offence, proceeded thus: "I admit that there are certain irregularities which are not the subject of criminal law. But when the criminal law happens to be auxiliary to the law of morality, I do not feel any inclination to explain it away. Now this offence is within the words of the act; for the defendants have, by false pretences, fraudulently contrived to obtain money from the prosecutor; and I see no reason why it should not be held to be within the meaning of the statute." Ashhurst, J. said, in giving his opinion, "The statute 30 Geo. II. c. 24. created an offence which did not exist before, and I think it includes the present. The legislature saw that all men were not equally prudent, and this statute was passed to protect the weaker part of mankind. The words of it are very general, 'All persons who knowingly by false pretences shall obtain from any person money, goods, &c. with intent to cheat or defraud, &c.;' and we have no power to restrain their operation." And by Buller, J. "It is in this case necessary to consider both the statute 33 Hen. VIII. c. 1., and the 30 Geo. II. c. 24. By the former of those the offence consists in obtaining money or goods by *false tokens*; and unless some token be used, the case does not come within that act. Now suppose a token had been produced in this case, and that the defendants, after telling their story to the prosecutor, had said, 'If you have any doubt, here is the colonel's gorget,' I think it would have fallen within the statute of 33 Hen. VIII. If it would, then let us consider what effect the 30 Geo. II. c. 24. has on the case:—the legislature thought that the former statute was too limited; and therefore the 30 Geo. II. c. 24. was passed; which enacts, 'That all persons who shall obtain money from others by *false pretences*, with intent to

[\*1388] cheat or defraud such persons, shall *\*be deemed offenders against the public peace.* The statute, therefore, clearly extends to cases which were not the subject of an indictment at common law. The ingredients of this offence are, the obtaining money by false pretences, and with an intent to defraud. Barely asking another for a sum of money is not sufficient: but some pretence must be used, and that pretence

false ; and the intent is necessary to constitute the crime. If the intent be made out, and the false pretence used in order to effect it, it brings the case within this statute." (a)

It was argued in this case, that even the generality of the term "false pretences," in the statute 30 Geo. II. c. 24. does not extend the law to cases, against which, common caution may guard : but Ashhurst, J. said, as we have seen, that as all men were not equally prudent, this statute was passed to protect the weaker part of mankind ; still, however, it is observed, it may be a question whether the statute extends to every false pretence, either absurd or irrational upon the face of it, or such as the party has, at the very time, the means of detecting at hand ; or whether the words, which are general, shall be construed co-extensively with the cheat actually effected by means of the false pretence used. And it is suggested, that these may, perhaps, be matter proper for the consideration of the jury, with the advice of the court. (b)

In the case which has been just given so much at length, Buller, J. cited the following, as a case in point: the defendant, Count Villeneuve, applied to Sir T. Broughton, telling him that he was intrusted by the Duke de Lauzun to take some horses from Ireland to London, and that he had been detained so long by contrary winds that his money was spent; by which representation Sir T. Broughton was induced to advance some money to him ; after which it turned out, that the prisoner never had been employed \*by the Duke de Lauzun, and that his whole story was a fiction. For this offence he was convicted, and sentenced to hard labour on the Thames. (c)

It has been agreed upon by all the Judges, that a case will be within the statute 30 Geo. II. c. 24. where the *credit is created by means of the false pretence* ; and they held that in the following case the prisoner would not have obtained the credit, but for the false account which he delivered. The evidence was that the prosecutors, from whom the prisoner was charged with obtaining money by false pretences, were clothiers ; that the prisoner was a shearman, in their service, and employed to superintend the other shear-men, and to take an account of the persons employed, and of the amount of their wages and earnings ; that at the end of each week he was supplied with money to pay the different shear-men by the clerk of the prosecutors, who advanced to him such sums as, according to a written account or note delivered to him by the prisoner, was necessary to pay them. The prisoner was not authorized to draw from the clerk, for money generally on account, but *merely for the sums actually earned by the shear-men* ; and the clerk was not authorized to pay him

Qu. whether the 30 Geo. II. c. 24. extends the law to cases against which common prudence may guard?

Count Villeneuve's case. Money obtained by the prisoner, on the false pretence &c. and being detained till [\*1389] his money was spent, holden to be within the 30 Geo. II. c. 24.

Witchell's case. A superintendant in a clothing manufactory having to keep an account of the number of shearers employed, and the amount of their earnings and wages, and to deliver it in every week, delivered in a

a Young and others (case of) 1789. 3 T. R. 98.

b 2 East. P. C. c. 16. s. 8. p. 328.

c Villeneuve's case, cor. Moreton, C. J. of Chester, and Buller, J. Chester, 1773. 3 T. R. 104, 105.

false account by which he obtained a larger sum than was due; and it was holden to be within the 30 Geo. II. c. 24.

[\*1390]

any sums except what he carried in in his account or note as the amount of what was due to the shearmen for the work they had done. It appeared that the prisoner on the 9th September 1796, delivered to the prosecutor's clerk a note in writing in the following form, "9th September 1796, Shearmen £44. 11s. 0d.," which was the common form in which he made out his account of the amount of their week's wages. And it further appeared, that in a book in his hand writing, which it was his business to keep, (of the men employed, of the work they had done, and of their earnings), there were the names of several men who had not been employed, who were entered as having earned different sums of money, and also false accounts of the work done by those who were employed; \*so as to make out the sum stated in the note to be due to the shearmen. Upon this evidence, the jury found the prisoner guilty; but sentence was respited in order to take the opinion of the Judges, whether this case were within the statute 30 Geo. II. c. 24., the prisoner's counsel contending that no cases were within the statute but those where the original credit was obtained by means of the false pretence; and that it did not extend to cases where there was a previous confidence, as he said was the case here. The Judges, after some difference of opinion, ultimately all agreed on the principle, that if the false pretence created the credit the case was within the statute; and they considered that in this case the defendant would not have obtained the credit, but for the false account which he had delivered in, and therefore that he was properly convicted. (d)

Story's case. The prisoner obtained money from the keeper of a post-office, by assuming to be the person mentioned in a money order, which he presented for payment; but he did not make any false declaration, or assertion in or-  
[\*1391]

In the following case it was contended, that where a party obtained money, by assuming a character which did not belong to him, *without making any false declarations, or assertions*, the statute did not apply. The indictment charged, that the prisoner fraudulently and deceitfully produced and delivered to E. the wife of John Rayner, which John Rayner was employed in the business of the post-office, as deputy post-master of the town of Nottingham, an order for payment of money, commonly called a money order, to wit, for the payment of the sum of one pound, to one John Storer; and that he unlawfully, &c. pretended to the said E. Rayner, that he was the person named in the said order, by means of which false pretence, he unlawfully, &c. obtained from the said E. Rayner the sum of one pound of the monies of the said John Rayner, with intent to cheat and defraud the said John Rayner; averring also, that the prisoner was not the person named in the order, nor the person entitled to receive the money therein mentioned. There was a second \*count differing from the first only in alleging the money to

d Witchell's case, East. T. and Trin. T. 1798. 2 East. P. C. c. 18. s. 8. p. 830. One of the Judges observed, that the prisoner was

not to have any sum he thought fit, on account; but only so much as was worked out.

be John Storer's, and the intent to be to cheat him. It appeared in evidence, that the prisoner went to the post-office at Nottingham, and inquired of Mrs. Rayner, who transacted the business there for her husband, if there were any letters directed to "John Story, post-office, Nottingham, to be left till called for." Mrs. Rayner finding amongst the letters one directed for "John Storer to be left till called for, Nottingham," and supposing it to be the letter for which the prisoner inquired, delivered it to him. The direction then upon the letter was a re-direction of it from Northampton, to which place it had been originally sent from Nottingham. The prisoner on receiving it, objected to the payment of two shillings for the postage, saying, "It was too much from Manchester;" but he paid the money, and went with the letter into the office passage, where he remained a sufficient time to have read it, after which he returned into the office with the money order in question, which had been enclosed in the letter, and offered it to Mrs. Rayner. Mrs. Rayner told him, he must write his name on the back of the order before she could pay him the money, upon which he wrote his real name, John Story, and she paid him with a one pound note. He then told her, that if she would look again she would find another letter for him, from Manchester, which she did, and he paid for it. The order in question (which was signed by Mrs. Rayner in the name of her husband), was in the following form.

"No. 52. Order given by one Deputy on another.

"£1. Post-Office, Nottingham, Augt. 2d. 1804.

"At sight pay John Storer, according to my letter of advice of the number and date, the sum of one pound, and place the same to the account of the money order office."

J. Rayner.

"To the Post-master of Northampton.

"This order must be signed by the person to whom it is made payable, and sent up with the quarterly account, as a voucher for the payment."

\*The terms of the letter clearly explained, that the order could not have been intended for the prisoner: and it was proved, that when he was first apprehended, he denied having received the money, or having ever seen Mrs. Rayner: but he afterwards assigned a want of money as the reason of his conduct. In the conversation with Mrs. Rayner, she never asked him, if he was the person for whom the letter and order were intended; nor did he say, that he was so. The prisoner's counsel contended, that as the order was given to the prisoner by Mrs. Rayner herself, and the prisoner had merely presented it to her for payment, without making any

der, to obtain the money.

[\*1392]



untrue declaration, or assertion, the case was not within the statute. The learned Judge left it to the jury to find against the prisoner, if they were satisfied, that by his conduct he had fraudulently assumed a character which did not belong to him, although he had made no false assertions: and the jury found him guilty. But the sentence was respited, in order to take the opinion of the Judges, as well upon the objection made as upon a further doubt, whether the signature of the prisoner's name, under the circumstances, did not amount to a forgery of a receipt for money, in which the lesser offence was merged. No opinion of the Judges was ever delivered in this case; but, at the subsequent assizes, the prisoner was sentenced to three months' imprisonment. (e)

Freeth's case. The fact of uttering a counterfeit note as a genuine note, held to be tantamount to a representation that it was so.

[\*1393]

It appears also, from the following case, that there may be a sufficient false pretence within the statute 30 Geo. II. by the acts and conduct of the party, without any verbal representations of a false and fraudulent nature. The first count of the indictment was framed on the 33 Hen. VIII. c. 1.: but it was ruled that this could not be supported. The second count was on the statute 30 Geo. II. c. 24. and stated, that the prisoner, intending to cheat and defraud John Beebee, of his monies, goods, and merchandizes, on &c., did, falsely, &c. utter, publish, offer, and tender to the said J. \*B. a false, forged, and counterfeit paper, as and for a true paper, and did then and there falsely, knowingly, and designedly, fraudulently and wickedly, pretend to the said J. B. that the said false, &c. paper was a true paper, and signed by one Wm. Sparrow, which paper was as follows.

Wolverhampton. 27 Feb. 1807.

I promise to pay the bearer on demand the sum of ten shillings and six-pence.

Wm. Sparrow.

with intention the monies, goods, &c. of the said J. B. to obtain, well knowing such paper to be forged and counterfeit; by means of which false pretences, he did obtain from the said J. B. a sum of money, to wit, nine shillings and tenpence, against the form of the statute, &c. The third count stated, that the prisoner, contriving and intending to cheat and defraud the said J. B. of his monies, goods, &c., on, &c. did fraudulently and wickedly utter, publish, offer, and tender to the said J. B. a false, forged, and counterfeit paper, as and for a true paper, and which he then and there did pretend and represent to the said J. B. to be a true paper, subscribed, &c. (and setting forth the paper,) with intention to cheat and defraud the said J. B. and the monies, goods, &c. of the said J. B. fraudulently to obtain, well knowing the said

\* *Rex v. Story, cor. Chambre, J. Nottingham Lent Ass. 1805. MS.*

paper to be forged, &c. by means of which last mentioned false pretences, he did then and there fraudulently obtain from the said J. B. a sum of money, to wit, nine shillings and ten-pence, of the money of the said J. B. It appeared by the evidence of John Beebee, that the prisoner came to his shop at Bilston, on a Saturday night, and asked for a loaf; that he served him with one for five-pence; that the prisoner then asked for some tobacco, and the witness served him with an ounce for three-pence, upon which the prisoner threw down a note for ten shillings and sixpence. The witness said he had no change, but in copper, which the prisoner said would do; and the witness then gave him nine shillings and ten-pence, in copper, which he \*took, together with the loaf and tobacco, and went away. The note was that which was set forth in the indictment, and was a forged note: and it was proved that the prisoner, in the course of the same evening and the next morning, put off several other notes of the same kind and amount, and all forged. Sparrow was a person of good credit; and his notes under twenty shillings were generally circulated in that neighbourhood, as it was found impracticable to pay in cash, or larger notes, the wages of the numerous day-labourers engaged in the iron manufactories. But by the statute 15 Geo. III. c. 51. s. 1. promissory notes, &c. negotiable for any sum less than twenty shillings, were declared absolutely void and of no effect; and the second section of that act declared, that if any person should publish or utter such notes, &c. for a less sum than twenty shillings, or should negotiate the same, he should forfeit any sum not exceeding twenty pounds, nor less than five pounds; the third section gave directions as to the form of conviction. The counsel for the prisoner objected, first, that this was not a case within the 30 Geo. II. c. 24. the general expressions of that statute being confined to cases of false suggestions of fact, as in the case of Young, and others; (*f*) to cases where the party falsely represents himself to be in a situation which he is not, as a servant of another, or as having his order or authority, or produces a false account of disbursements, on the face of which the party would be entitled to be reimbursed, as in Witchell's case (*g*); and to those cases where credit is acquired, and the monies, &c. are obtained by the false pretence. And it was urged, that in this case the credit was given to the note, and to no representation or pretence of the prisoner himself; that the fraud consisted in the fabrication of the instrument, not in any representation made by the prisoner. But the learned Judge who tried the prisoner thought that the uttering it as a genuine note was tantamount to a representation that it was so. An objection was also taken, as to this being a cheat at common law, [\*1394]

*f. Ante*, 1335.*g. Ante*, 1389.

\*upon the ground that as a note of this sort was void, and prohibited by law, it was no offence to forge it, or to obtain money upon it when forged, as the party taking it ought to be upon his guard. The case was, however, left to the jury, with a direction that the evidence, if true, sustained both or one of the latter counts of the indictment: and the jury found the prisoner guilty on both these counts: and the learned Judge respited the sentence, for the purpose of submitting the points to the consideration of the twelve Judges; who all held the conviction right; and the prisoner was afterwards sentenced to six months' imprisonment. (*h*)

Airey's case. Where a carrier pretended to a consignor of goods that he had delivered them to the consignee, and thereby obtained money for the carriage, it was holden that the offence was within the 30 Geo. II. c. Coleman's case. Pretence of being sent [\*1396] by a neighbour to borrow money.

In a case where the defendant was charged in an indictment that he, being a common carrier, had received goods to carry and deliver at a certain place; and that afterwards contriving and intending to cheat the consignor of his money, he pretended to him that he had carried and delivered the goods to the consignee, and that the consignee had given to him (the said carrier) a receipt expressing the delivery of the goods; but that he had lost, or mislaid, the receipt; and then demanded sixteen shillings for the carriage of the goods, and by means of such false pretences, (which were expressly stated to be false) obtained the sum of sixteen shillings from the consignor, it was holden that the offence was sufficiently brought within the words and meaning of the statute. (*i*)

Where the prisoner went to a tradesman's house, and said she came from a Mrs. Cook, a neighbour, who would be much obliged if he would let her have half-a-guinea's worth of silver, and that she would send the half-guinea presently; upon which she obtained the silver, went away with it, and never returned; the case was holden not to amount to felony. (*k*) And it is said that, in truth, this was \*a loan of the silver, upon the faith that the amount would be repaid at another time; it was money obtained by a *false pretence*; and that the same determination has been made in similar cases at the Old Bailey. (*l*)

Atkinson's case. Obtaining bank-notes by means of a letter written in the name of another to a third person. Collecting

In a case where the prisoner was indicted for stealing two bank-notes, and it was proved that he obtained the notes by means of a letter written in the name of another, to a third person, requesting a loan of money; the offence was holden not to amount to felony; but the Judges considered it as coming within the 33 Hen. VIII. c. I., that statute particularly speaking of counterfeit letters. (*m*)

It has been holden, that to collect subscriptions for an illegal unincorporated trading company, prohibited by 6 Geo.

*h* Freeth's case, *cor.* Graham, B. *Stafford* Sum. Ass. 1807. MS.

*i* *Rex v. Airey*, 2 East. R. 30.

*k* Coleman's case, O. B. 1785. 2 East. P.

C. c. 16. s. 104. p. 672. 1 Leach 303, note (*a*).

*l* 2 East. P. C. c. 16. s. 104. p. 673.

*m* Atkinson's case, 2 East. P. C. c. 16. s. 104. p. 673. and *ante*. 1066, 1067.

I. c. 18. (n) as secretary to such company, comes so near to obtaining money under false pretences, that if a man is indicted for so doing, he cannot be considered as prosecuted without any reasonable or probable cause. (o)

subscriptions for illegal trading companies.

We have seen, that it was holden that an indictment for a cheat or fraud at common law could not be supported against a person for delivering a draft on a banker, which he knew he had no authority to draw, and would not be paid, and thereby obtaining certain lottery tickets. (p) But a different doctrine appears to have been recently laid down in a case of an indictment on the statute 30 Geo. II. c. 24. The prosecutor was a jeweller at Cheltenham, who was defrauded of goods to a considerable value by the defendants. Among other things, for the purpose of deceiving him, they gave him in payment for the goods a cheque upon certain bankers in London, with whom it was proved they kept no cash, and had no account. It was contended on behalf of the defendants, that as far as the \*cheque was concerned, they were not criminally liable. But Bayley, J. is reported to have said, "This point has recently been before the Judges; and they were all of opinion, that it is an indictable offence, fraudulently to obtain goods by giving in payment a cheque upon a banker with whom the party keeps no cash, and which he knows will not be paid." And the defendant's were convicted and sentenced to seven years' transportation. (q)

It is an offence indictable under 30 Geo. II. c. 24. fraudulently to obtain goods by giving in payment a cheque upon a banker with whom the party keeps [\*1397] no cash, and which he knows will not be paid.

It is said, that though a man cannot be guilty of forgery, merely by passing himself off for the person whose real signature appears to a written instrument, although for the purpose of fraud, and in concert with such real person, there being no false making, yet this appears to be a false pretence within the statute 30 Geo. II. c. 24. (r)

Several points were ruled in a modern case, upon the statute 30 Geo. II. c. 24. The indictment charged that the defendant having in his custody and possession a certain parcel, to be by him delivered to Maria, countess dowager of Ilchester, upon the delivery of which he was authorized and directed to receive and take the sum of six shillings and sixpence and no more, for the carriage and portage of the same; yet that defendant produced and delivered to Thomas Harris, then being servant to the said Countess of Il-

Rex v. Douglass. Upon an indictment on the 30. Geo. II. c. 24. it was holden that where the defendant, a porter, delivered

n *Ante*, 441.

o *Rex v. Stratton and others*, cor. Lord Ellenborough, C. J. 1809, 1 Campb. 549 in the notes.

p *Rex v. Lara*, *ante*, 1376.

q *Rex v. Jackson and another*, cor. Bayley, J., *Gloucester Lent Ass.* 1813. 3 Campb. 370. And see *Lockett's case*, 1772. 1 Leach 94. 6 T. R. 567 note (c) 2 East. P. C. c. 19. s. 38. p. 940. where upon an indictment for

forging an order for payment of money, being in truth a draft upon a banker drawn in the name of a fictitious person, the Judges held that it was immaterial whether such person existed or not, it being sufficient that the order on the face of it imported a right, on the part of the drawer, to direct such a transfer of his property.

r 2 East. P. C. c. 19. s. 5. p. 856.

along with a *basket* of fish a false ticket, denoting that [\*1398] 9s. 10d. instead of 6s. 6d. was to be paid for it, the basket was well described in the indictment as a *parcel*; but that it would have been otherwise, if the indictment had been on the 39 Geo. III. c. 58. which enumerates *baskets*, *packages*, *parcels*, &c. specifically.

Where an indictment on the 30 [\*1399] Geo. II. c. 24. avers that the defendant, obtained a sum of money, being the proper monies of A. and it appears that the

chester, the said parcel, together with a certain false and counterfeit ticket, made to denote that the sum of nine shillings and ten-pence was charged for the carriage and portorage of the said parcel, and unlawfully, knowingly, and designedly, \*did falsely pretend to the said Thomas Harris, that the said false and counterfeit ticket was a just and true ticket, and that the said sum of nine shillings and tenpence had been charged, and was due and payable for the carriage and portorage of the said parcel; and that defendant was authorized and directed to receive and take the said sum of nine shillings and tenpence for the carriage and portorage of the said parcel: by means of which said false pretences, defendant did unlawfully, knowingly, and designedly obtain of and from the said Thomas Harris the sum of three shillings and fourpence in monies, of the monies of the said countess, with intent to cheat and defraud her of the same; whereas in truth and in fact, &c. The delivering the parcel mentioned in the indictment, and receiving nine shillings and tenpence, instead of that which he ought to have received, namely, six shillings and sixpence, was sufficiently brought home to the defendant. But it appeared that the parcel was a *basket* of fish: upon which it was contended on behalf of the prisoner, in the first place, that the indictment was not upon the statute 30 Geo. II. c. 24. but upon a public local act, the 39 Geo. III. c. 58. (s) by which it is enacted, that if any porter or other person employed in the portorage or delivery of the “boxes, *baskets*, packages, *parcels*, trusses, game, or other things,” mentioned in the act, shall demand or receive in respect of such portorage or delivery, any greater sum or sums, than the rates or prices thereinbefore fixed, such person shall for every such offence forfeit not exceeding twenty, nor less than five shillings; and that, being upon such act, the *basket* in question was not properly described as a *parcel*, that parcel was not a generic name, and that the indictment should have described the thing according to the fact. (t) Lord Ellenborough, C. J. was of opinion, that if the \*indictment had been upon the statute cited of the 39 Geo. III. this would have been a fatal variance; but that, as the indictment was upon the 30 Geo. II. c. 24. a basket answered the general description of a parcel well enough. In the next place it was objected that as the nine shillings and tenpence were paid to the defendant by the servant of the countess of Ilchester, the indictment had improperly averred that the monies obtained by the defendant, namely, the three shillings and fourpence, were “the monies of the countess,” though she had afterwards repaid the servant the whole sum of nine

s Entitled “an act for regulating the rates of portorage to be taken by innkeepers, and other persons within the cities of London and

Westminster, the borough of Southwark, and places adjacent.”

t See as to this objection, Cook’s case, *ante*. 1131



shillings and tenpence; that in fact the three shillings and fourpence never had been her's, and whether or not she was bound to reimburse her servant, this particular sum of three shillings and fourpence was at the instant the sole property of the servant. And upon this point Lord Ellenborough held, that the subsequent allowance by the countess of Hchester did not make the money paid to the defendant her property at the time, that she was not chargeable for more than was actually due for the carriage of the basket, and that it depended upon herself whether she should pay the overplus. But the servant afterwards stated, that at the time of this transaction he had in his hands upwards of nine shillings and tenpence, the property of his mistress, which Lord Ellenborough considered sufficient to sustain the averment. In the last place it was objected, that as the offence certainly came within the 39 Geo. III. c. 58. the defendant ought to have prosecuted on that statute: but Lord Ellenborough said, that the remedy given by that statute was cumulative, and did not take away the remedies which before existed either at common law, or by other acts of parliament. (u)

money was obtained from B. acting as A.'s servant who had not at that time in his possession any money belonging to A. but afterwards was repaid by him the sum delivered to the defendant, the variance is fatal.

The local statute 39 Geo. III. c. 58. only gives a cumulative remedy.

[\*1400] As to the statement of the false tokens and false pretences.

It is clear that it is not sufficient in an indictment on the \*statute 33 Hen. VIII. c. 1. to state generally that the offence "was effected by means of *certain false tokens*, or on the 30 Geo. II. c. 24. that it was effected by *certain false pretences*: it is necessary in the one case to specify the false tokens; (y) and, in the other, to state what the false pretences are. (z) They should be set out, in order that the court may see what they are, and whether they come within the statutes. (a) But it does not appear to be necessary to describe them more particularly than they were shown or described to the party at the time; and, in consequence of which, he was imposed upon: and it does not seem to be necessary to make any express allegation that the facts set forth shew a false token, or a false pretence. (b) In a case where it was assigned for error that it was no where alleged in the indictment that the defendant "did *falsely* pretend," the judgment was nevertheless affirmed. The indictment alleged, in substance, that the defendant unlawfully, knowingly, and designedly, pretended certain things, "by means of which said *false pretences*" he obtained the money; and, in the subsequent part of the indictment, all the pretences were averred to be false: and the court held this to be sufficient. And it seems also to have been their opinion, that the indictment would have been good if it had only alleged that the defend-

u Rex v. Douglass, *cor.* Lord Ellenborough, C. J. 1808. 1 Campb. 212. But *qu.* whether the offence charged in the indictment is within the 39 Geo. III. c. 58. It certainly is not within the section cited, which relates only to an overcharge for the portage.

y Rex v. Munoz, 2 Str. 1127. 7 Mod. 316.

vOL. II.

37

1 Sess. Cas. 201.

s Rex v. Mason, 2 T. R. 581.

a Fuller's case, 2 East. P. C. c. 18. s. 13. p. 837.

b 2 East. P. C. c. 18. s. 13. p. 837, 838. Terry's case, Cro. Car. 564.



ant obtained the money by such and such pretences, (stating them;) and then averred that those pretences were false. (c) But a special averment, that the pretences, or some of them, are false, cannot be dispensed with; and, in a case where it was omitted, and an exception taken on a writ of error, the judgment was reversed. The court considered the case by analogy to the necessary averments in an indictment for perjury, framed under the stat. 23 Geo. II. c. 11., (d) and were [\*1401] decidedly of opinion that, \*where a party is charged with obtaining money, &c. by false pretences, the indictment ought to announce to him the precise charge by distinct averments, and state in what particular such pretences are false. Lord Ellenborough, C. J. said, "To state merely the whole of the false pretence, is to state a matter generally combined of some truth as well as falsehood. It hardly ever happens that it is unaccompanied with some truth. Suppose the offence, instead of being comprized within five or six separate matters of pretence, as here, had branched out into twenty or thirty, of which some might be true, and used only as the vehicle of the falsity; are we to understand from this form of charge that it indicates the whole to be false, and that the defendant is to prepare to defend himself against the whole? That would be contrary to the plain sense of the proceeding, which requires that the falsification should be applied to the particular thing to be falsified, and not to the whole. And the convenience also of mankind demands, and, in furtherance of that convenience, it is part of the duty of those who administer justice to require that the charge should be specific, in order to give notice to the party of what he is to come prepared to defend; and, to prevent his being distracted amidst the confusion of a multifarious and complicated transaction, parts of which only are meant to be impeached for falsehood. The legislature have expounded their understanding of the matter in the case of perjury; and I am at a loss to discover why, in reason, in justice, and in mercy to the party, the charge in this case should not be as distinctly ascertained by proper averments that specifically draw his attention to it, as in the case of perjury." (e)

As to the certainty with which [\*1402] a false pretence should be stated.

In a case which has been previously mentioned, on another point, (f) an objection was taken that the pretence was not stated with sufficient *certainty*, inasmuch as a wager \*therein mentioned was stated only to have been made "with a colonel in the army then at Bath," without setting forth the colonel's name. (g) But the objection was overruled; and Lord Kenyon, C. J. said, that the charge was sufficiently certain to enable the defendants to know what they were called upon to

c Rex v. Airey, 2 East. R. 30. *ante*, 1395.

d *Post*. Book V. Chap. on *Perjury*.

e Rex v. Perrott, 1814. 2 M. & S. 379, 386.

f Young and others, (case of,) *ante*, 1385, *et sequ.*

g See the abstract of the indictment, *ante*, 1385, 1386.

answer for; and that perhaps the colonel's name with whom the wager was stated to have been made was not mentioned; in which case he could not have been described with greater accuracy. And further, that if such a wager had been actually depending, it was competent to the defendants to have proved it in their defence.

In the same case it was also holden, that several defendants might be charged jointly in the same indictment, if they were all present and in concert together, taking part in the same transaction. And it was holden also to be no objection in arrest of judgment, that the indictment contained several charges of the same nature in the different counts. Lord Kenyon, C. J. said, "This objection would be well founded if the legal judgment on each count was different; it would be like a misjoinder in civil actions. But, in this case, the judgment on all the counts is precisely the same; a misdemeanor is charged in each. Most probably the charges were meant to meet the same facts; but, if it were not so, I think they may be joined in the same indictment."

Several defendants may be charged jointly in the same indictment, if they were all present, and taking part in the transaction.

Upon an indictment for obtaining money by false pretences, the pretences which, as we have seen, must be distinctly set out, (h) must at the trial be proved as laid: so that, where the indictment stated that the defendant pretended that he had paid a sum of money into the bank of England, and it appeared upon the evidence that he did not say that he paid the money, but that he said generally that the money had been paid into the bank, Lord Ellenborough, C. J. held \*this to be a fatal variance; and said, that an assertion that money had been paid into the bank was very different from an assertion that it had been paid into the bank by a particular individual. (i)

The pretences must be proved as laid.

[\*1403]

It has been said that offenders can only suffer corporal punishment, but cannot be fined by force of the statute 33 Hen. VIII. c. 1. alone; (k) but a precedent is cited by which it appears that part of the punishment of a person convicted on that statute was a fine of 500*l.* (l) And it is observed, that cases may occur where the offender may be fined at common law as well as corporally punished under that statute; (which certainly was not meant to abridge, but rather to extend the common law;) and that such might have been done in the precedent cited, which was a case of direct forgery at common law. (m) We have already seen that the punishment under the statute 30 Geo. II. c. 24. may be by fine and imprisonment, whipping, or transportation for seven years. (n)

Punishment.

h *Ante*, 1400.

i *Reg. v. Moxton*, cor. Lord Ellenborough, C. J., 1808. 1 Campb. 494

k 3 Inst. 133

l 1 Hawk. P. C. c. 71. s. 6.; citing Terry's case, Cro. Car. 564.

m 2 East. P. C. c. 18. s. 14. p. 830, 839.

*Ante*, 1370, 1373.

n See the Statute, *ante*. 1382.

No restitu-  
tion by the  
court of  
goods ob-  
tained by  
false pre-  
tences.

Though in cases where goods have been obtained from another by mere fraud, the court have no power of awarding restitution on conviction of the offender, as in cases of felony; (o) yet it appears that the obtaining goods by false pretences does not change the property in the goods. (p)

[\*1404]

## \*SECTION III.

*Of Cheats and Frauds Punishable by other Statutes.*

THE few statutes by which, in addition to those which have been already mentioned, cheats and frauds are subjected to punishment, will be mentioned according to the order of the time at which they were passed.

13 Eliz. c.  
5. For the  
avoiding  
fraudulent  
convey-  
ances,  
judgments,  
&c.,

Enacts that  
they shall  
be void:

And that  
the parties  
to them  
shall incur  
a forfeiture  
of a year's  
value of the  
lands, &c.;  
and suffer  
[\*1405]  
imprison-  
ment for  
one half  
year.

The statute 13 Eliz. c. 5. intituled, "An Act against Fraudulent Deeds, Gifts, Alienations, &c." recites that feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, had been and were devised and contrived of malice, fraud, covin, collusion, or guile; to the end, purpose, and intent, to delay, hinder, or defraud creditors and others, of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs;" and then enacts, in the first place, that "all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods and chattels, or of any of them, or of any lease, rent, common, or other profit or charge out of the same lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, writ, judgment, and execution, shall be deemed and taken;" (only as against that person, his heirs, executors, assigns, &c. whose actions, suits, &c. by such fraudulent devices and practices, as aforesaid, shall or might be in any ways disturbed, delayed, or defrauded,) "to be clearly and utterly void." The third section then enacts, "That all and every the parties to such feigned, covinous, or fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions, and other things before expressed, and being privy and knowing of the same, or any of them; which shall wittingly and willingly put in ure, avow, maintain, justify, or \*defend the same, or any of them, as true, simple, and done, had or made *bona fide*, and upon good consideration; or shall alien. or assign, any the lands, tenements, goods, leases, or other things before-mentioned, to him or them conveyed as is aforesaid, or any part thereof; shall

\* Parker v. Patrick, 5 T. R. 175.: and De Veaux and others, (case of.) 2 Leach. 585

p Noble v. Adams. 7 Taunt. 59.

incur the penalty and forfeiture of one year's value of the said lands, tenements, and hereditaments, leases, rents, commons, or other profits, of or out of the same; and the whole value of the said goods and chattels; and also so much money as are or shall be contained in any such covinous and feigned bond;" one moiety to the crown, the other to the party grieved, to be recovered in any of the Queen's courts of record, by action, &c. : "and also being thereof lawfully convicted, shall suffer imprisonment for one half year, without bail or mainprise."

The statute 27 Eliz. c. 4. recites, that subjects and corporations, "after conveyances and purchases of lands, tenements, leases, estates, and hereditaments, for money, or other good considerations, may have, incur and receive great loss and prejudice by reason of fraudulent and covinous conveyances, estates, gifts, grants, charges, and limitations of uses heretofore made or hereafter to be made of in or out of lands, tenements, or hereditaments so purchased or to be purchased; which said gifts, grants, charges estates uses and conveyances were or hereafter shall be meant and intended by the parties that so make the same to be fraudulent and covinous, of purpose and intent to deceive such as have purchased, or shall purchase, the same; or else, by the secret intent of the parties, the same to be to their own proper use, and at their free disposition, coloured nevertheless by a feigned countenance, and shew of words and sentences, as though the same were made *bonâ fide*, for good causes, and upon just and lawful considerations." The second section then enacts, "That all and every conveyance, grant, charge, lease, estate, incumbrance and limitation of use or uses of in or out of \*any lands, tenements, or other hereditaments, whatsoever, had or made for the intent and of purpose to defraud and deceive such person or persons, bodies politic or corporate, as have purchased or shall afterwards purchase in fee-simple, fee tail, for life, lives or years, the same lands, tenements and hereditaments, or any part or parcel thereof, so formerly conveyed, granted, leased, charged incumbered or limited in use, or to defraud and deceive such as have or shall purchase any rent, profit or commodity in or out of the same, or any part thereof, shall be deemed and taken" (only as against that person, body politic, &c. their heirs, successors, executors, &c. and persons lawfully claiming under them, which so purchase for money or other good consideration, the same lands, &c.) "to be utterly void." And the third section enacts, "That all and every the parties to such fained, covinous and fraudulent gifts, grants, leases, charges or conveyances before expressed, or being privy and knowing of the same or any of them, which shall wittingly and willingly put in ure, avow, maintain, justify or defend the same or any of them as true, simple and done, had

27 Eliz. c. 4. recites the mischief of fraudulent and covinous conveyances, &c.

And enacts that fraudulent conveyances [\*1406] made to deceive purchasers shall be void :

And that the parties to such conveyances, who avow the same, shall incur the forfeiture

of a year's value of the lands, &c. and suffer imprisonment for one half year.

or made, *bonâ fide*, or upon good consideration, to the disturbance or hindrance of the said purchaser or purchasers, lessees or grantees, or of or to the disturbance or hindrance of their heirs, successors, executors, administrators or assigns, or such as have or shall lawfully claim any thing by from or under them or any of them, shall incur the penalty and forfeiture of one year's value of the said lands, tenements and hereditaments so purchased or charged;" (the one moiety to the crown, and the other moiety to the party grieved, to be recovered in any of the queen's courts of record, by action, &c.) "And also, being thereof lawfully convicted, shall suffer imprisonment for one half year without bail or mainprize."

9 Ann. c. 14. and [\*1407] other statutes relating to gaming.

The statutes relating to those cheats which are effected by means of cards, dice, and other kinds of *gaming* (and particularly \*the statute 9 Anne, c. 14.), have been mentioned in a former part of this treatise. (t)

6 Geo. I. c. 18. as to cheating, &c. by trading adventures.

The statute also of 6 Geo. I. c. 18. which relates to cheating or bubbling the public by trading adventures, has been noticed in the chapter treating on *nuisances*, as such adventures are expressly declared to be nuisances by the statute. (u)

9 Geo. II. c. 5. s. 4. Persons pretending to exercise witchcraft, &c. tell for tunes, &c. and being convicted, are to be imprisoned for a year; and may be obliged to give sureties for good behaviour.

The statute 9 Geo. II. c. 5. repeals certain acts relating to conjuration, witchcraft, &c., and then, for the more effectual preventing and punishing of *any pretences* to any acts or powers of witchcraft, sorcery, incantment, or conjuration, whereby ignorant persons are frequently deluded and defrauded; enacts, "that if any person shall pretend to exercise or use any kind of witchcraft, sorcery, incantment, or conjuration, or undertake to tell fortunes, or pretend from his or her skill or knowledge in any occult or crafty science to discover where or in what manner any goods or chattels, supposed to have been stolen or lost, may be found; every person so offending, being thereof lawfully convicted (on indictment or information in *England*, or on indictment or libel in *Scotland*), shall, for every such offence, suffer imprisonment by the space of one whole year without bail or mainprize, and once, in every quarter of the said year in some market town of the proper county upon the market day, there stand openly on the pillory by the space of one hour, (x) and also shall (if the court by which judgment shall be given shall think fit) be obliged to give sureties for his or her good behaviour, in such sum and for such time as the said court shall judge proper according to the circumstances of the offence, and in such case shall be further imprisoned until such sureties shall be given." (y)

t *Ante* 594.

u *Ante* 441.

x 9 Geo. II. c. 5. s. 4.

y As to the abolition of the punishment of the pillory, except in cases of perjury, &c. see 56 Geo. III. c. 138. *ante* 211, note (n).



\*The statute 32 Geo. III. c. 56. entitled, "an act for preventing the counterfeiting of certificates of the characters of servants," after reciting the great and increasing evil occasioned by false and counterfeit characters of servants being given either personally, or in writing, by evil-disposed persons, enacts, that any person falsely personating any master or mistress, or the executor, administrator, wife, relation, housekeeper, steward, agent, or servant, of a master or mistress, and, either personally or in writing, giving a false character to a servant; or pretending, or falsely asserting in writing, that a servant had been hired for a period of time, or in a station, or was discharged at any other time, or had not been hired in any previous service, contrary to truth; and any person offering himself or herself as a servant, pretending to have served where he or she has not served, or with a false certificate of character, or who shall alter such certificate; and any person who having before been in service shall pretend not to have been in any previous service; shall, on conviction before two justices, forfeit the sum of twenty pounds. (a)

2 Geo. III. c. 56. offences relating to the giving of false characters to servants made punishable by a penalty on conviction before two justices.

The statute 37 Geo. III. c. 143. gives a summary jurisdiction to justices of the peace in petty sessions, to punish retailers, in whose possession false weights and balances shall be found. And the statute 55 Geo. III. c. 43. provides \*for the punishment of persons who shall offend by using false and deficient measures.

37 Geo. III. c. 143. as to false weights and balances. [\*1409]

The statute 56 Geo. III. c. 63. which was passed for regulating the general penitentiary for convicts at *Millbank*, in the county of *Middlesex*, enacts by s. 12. that if the committee (appointed by the act) shall suspect any fraudulent or improper charges in any accounts of the governor, or other officer or servant, or any omission therein, they may examine on oath, &c.; and in case there shall appear any false entry, knowingly made, or any fraudulent omission, or other fraud or collusion, they may dismiss the officer, &c. and cause an indictment to be preferred against them at the next quarter or other general session of the peace for the county wherein the penitentiary is situated, or any other adjoining county, and that in case the person indicted be found guilty of such offence, he shall be punished by fine and imprisonment at the discretion of the court.

56 Geo. III. c. 63. s. 12. Officers or servants, &c. making any false entry or fraudulent omission in their accounts, &c. may be indicted and punished by fine and imprisonment.

\*See the different sections of the statute, the substance of which only is here given. The statute provides also that the informer may be a witness, and indemnifies offenders discovering accomplices before information. It also gives a form of conviction, provides for the recovery of the penalties, and gives an appeal to the quarter sessions. An abstract of the statute is given in 5 Burn. Just. *Servants*, sect. 11. In 8 Ev. Col. Stat. Pt. vi.

Cl. xxxi. No. 12. p. 909. note (1), the learned editor says, that a case which he had lately known to occur, is not within the provisions of the act, although attended with all the mischiefs intended to be provided against by it; viz. the case of assuming the name of another person who has been a servant in the same place with the offender. As to the civil consequences of knowingly giving a false character, see 1 Black. Com. 432. note (13).



Mutiny  
acts. 57  
Geo. III. c.  
12. s. 96.  
Persons  
making  
false re-  
presenta-  
tions for  
the pur-  
pose of  
obtaining  
bounty,  
guilty of  
obtaining  
money un-  
der false  
pretences.

[\*1410]  
S. 100.

Appren-  
tices en-  
listing  
themselves  
may be  
imprison-  
ed and  
kept to  
hard la-  
bour for  
two years,  
may be in-  
dicted un-  
der the  
30 Geo. II.  
c. 24., and  
are made  
liable to  
to serve  
as soldiers  
after the  
expiration  
of the ap-  
prentice-  
ship.  
Cheats and  
frauds in  
particular  
trades.

The annual mutiny acts usually contain clauses provid-  
ing for the punishment of apprentices and other persons  
fraudulently enlisting themselves. By the 57 Geo. III. c.  
12. s. 96. "any person who shall knowingly, wilfully, and  
designedly, make any false representation of any particular  
contained in the oaths respectively marked (A) and (B),  
and certificates marked (C) and (D) in the schedule to this  
act respectively contained and annexed, before the justice  
of the peace or magistrate, at the time of his attestation,  
for the purpose of obtaining, and shall obtain any enlist-  
ing money, or any bounty for entering into his majesty's  
service, or any other money, shall be deemed guilty of ob-  
taining money under false pretences, within the true in-  
tent and meaning of the 30 Geo. II. c. 24; and the pro-  
duction of such certificate, and proof of the hand-writing  
of the justice of the peace giving such certificate, shall be  
sufficient evidence of such party having represented the  
several particulars contained in the oath sworn by him,  
and specified in the certificate of the justice at the time of  
\*his being attested." And, by a subsequent section, "if  
any person duly bound as an apprentice shall enlist as a  
soldier in his majesty's land service; and shall state to  
the justice of the peace or magistrate before whom he shall  
be carried that he is not an apprentice, every such person  
so offending, and being thereof duly convicted, shall be and  
is hereby declared to be subject and liable to be imprisoned  
in any gaol or house of correction, and kept to hard labour  
for two years, may be indicted and punished for obtaining  
money under false pretences under the provisions of the said  
recited act of the thirtieth year of the reign of his late ma-  
jesty King George the second, and shall after the expiration  
of his apprenticeship, whether such person shall have been  
so convicted and punished or not, be liable to serve as a sol-  
dier in any regiment of his majesty's regular forces; and if,  
on the expiration of his apprenticeship, he shall not deliver  
himself to some officer authorized to receive recruits, may  
be taken as a deserter from his majesty's forces." (b)

In addition to the statutes which have been thus mentioned  
there are others relating to cheats or frauds practised by ser-  
vants and others, in particular trades, and punishable by pe-  
cuniary fines, or summary proceedings, before magistrates,  
which will be found arranged under their proper titles in that  
very excellent work, "Dr. Burn's Justice of the Peace." (c)

b S. 100. As to similar offences by per-  
sons enlisting into the *marine* forces, see the  
annual acts relating to those forces. We  
have seen that it was a cheat or fraud at  
common law for an apprentice to enlist as a  
soldier, and obtain the king's bounty. Jones's  
case, ante 1367. And see 3 Burn. Just. *Mili-  
tary Law*.

c Such as the 39 & 40 Geo. III. c. 77. s. 4.  
respecting the fraudulent walling or stacking  
of coal, &c. 1 Burn. Just. tit. *Coals and Coal  
Mines*; the 1 Eliz. c. 12. as the deceitful  
making of linen cloth, 3 Burn. Just. tit. *Lin-  
en Cloth*; the 13 Geo. III. c. 23. 17 Geo. II.  
c. 5., &c. as to the deceitful working of  
woollen cloth, 5 Burn. Just. tit. *Woollen Ma-  
nufacture*.

•CHAPTER THE TWENTY-SEVENTH.

Of Forgery. (1)

FORGERY at common law has been defined as "the fraudulent making or alteration of a writing to the prejudice of another man's right;" (a) or, more recently, as a false making, Definitions of the offence.

α 4 Black. Com. 247.

(1) MASSACHUSETTS.—An indictment for forging a promissory note, need not allege the endorsement of the note, though it be forged. It is no part of the note, and a motion for a new trial because the endorsement was not alleged, was unanimously overruled. *Commonwealth v. Ward*, 2 Mass. Rep. 397.

Uttering a forged bank bill, with the name of a fictitious cashier counter-signed thereto, is not within the statute of 6 March 1801, but it is a fraud at common law, "and the court is bound to advert upon it." A motion in arrest of judgment, because the jury found that the name of the cashier inserted in the forged bill, "was not the name of any person who has been at any time, cashier of the said bank," was overruled, and judgment for the fraud, at common law, was rendered against the defendant. *Commonwealth v. Boynton*, 2 Mass. Rep. 77.

(The same course has been pursued in other cases by the Judges in this state, at nisi prius.—Editor.)

The possession of materials devised, adapted and designed, for forging and counterfeiting bank notes, *without an intention to use them in counterfeiting*, is not an offence within the statute of March 15 1805. The words "devised, adapted, and designed," relate to the form or the nature of the materials. They have no reference to the person having them in his possession, or to his intention. *Commonwealth v. Morse*, 2 Mass. Rep. 128. 132.

Where a merchant intrusts his clerk with his blank endorsements, and one by false pretences obtains and uses them, such fraudulent use of them is not forgery; "the paper with the blank endorsement was delivered with the intention that a note should be written on the face of the paper by the promiser, for the purpose of negotiating it as endorsed in blank by the house; and we must consider the delivery by the clerk, who was intrusted with the power of using these endorsements (although his discretion was confined) as a delivery by one of the house,—whether he was deceived, as in the present case, or had voluntarily exceeded his discretion; for the limitation imposed on his discretion was not known to any but himself and his principals. If the clerk has fraudulently, and for his own benefit, made use of all the endorsements for making promissory notes to charge the endorsers, we are of opinion that this use, though a gross fraud, would not amount to forgery; and for the same reason when one of these endorsements was delivered by the clerk, who had the custody of them, to the promiser, who by false pretences had obtained it, the fraudulent use of it would not be a forgery." *Per Parsons, C. J. in Putnam & al. v. Sullivan & al.* 4 Mass. Rep. 53.

Murry Brown was indicted upon the 2d sect. of the statute of 1804. ch. 120 for having in his possession ten or more counterfeit bank bills, with intent to pass them. He was convicted and sentenced upon this indictment, and afterwards brought a writ of error to reverse the sentence and assigned the fol-

a making *malò animo*, of any written instrument, for the purpose of fraud and deceit:" (b) the word "making" in this last definition being considered as including every alteration of, or addition to, a true instrument. (c) Besides the offence of

b 2 East. P. C. c. 19. s. 1. p. 852. Parkes and Brown (case of) 2 Leach 785. 2 East. P. C. c. 19. s. 49. p. 965.

c *Id. Ibid.* As to the word *forge*, it is said in 3 Inst. 169. "To forge is metaphorically

taken from the smith, who beateth upon his anvil, and forgeth what fashion or shape he will: the offence is called *crimen falsi*, and the offender *falsarius*; and the Latin word to forge is *falsare*, or *fabricare*."

lowing errors: that the bills were alleged to be payable to the *bearers* thereof, instead of *bearer*; that they were not alleged to be *similar* bills; that they were described as promissory notes, or bank bills; and that it was not alleged that the plaintiff in error *had knowledge of the false making*, &c. These objections to the indictment were, by the unanimous opinion of the court, held to be insufficient, and judgment was rendered that the prisoner take nothing by his writ. *Brown, in Error v. Commonwealth*, 8 Mass. Rep. 59.

In the case of the *Commonwealth v. Hayward*, 10 Mass. Rep. 34. it was decided, that it is not an indictable offence, to tear or cut a piece out of a bank note, with intent, with the bill thus altered, and with such piece, together with other pieces of similar bank notes, altered, cut, and torn out, to form other bank bills, with intent to utter the same, and thereby to injure and defraud the banking company issuing such notes. (The method pursued by the defendant was, to take a number, say seven, bills of the same bank, and of the same denomination, and to cut a strip, perpendicularly from each bill, uniting the parts thus separated, and with the several strips united, to form an eighth bill.) In this case the court said, "it was a non descript offence, and not within the provision of the law against altering bills, which is such an alteration as increases the apparent value of the bill. If there is danger of the growth of this practice, the legislature will provide a statute to meet the evil. If the defendant had completed, what may be presumed to have been his intent, and had made an eighth bill, perhaps this would have been forgery."

On an indictment for altering an order for money payable to the defendant, the evidence was his confession that another did it, the defendant knowing, and being present at and consenting to the alteration, and it was held sufficient to warrant a conviction. *Commonwealth v. Stevens*, 10 Mass. Rep. 181.

The procuring a counterfeit bank bill to be passed by an ignorant boy as a true one, was held to be a sufficient passing within the statute of 1804. ch. 120. s. 3. *Commonwealth v. Hill*, 11 Mass. Rep. 136.

This opinion was sanctioned by the court after advisement, and the following authorities were cited. 1 Com. Dig. Abatement. E. 4. 1 *Ld. Raym.* 282. Foster's Cr. Law, disc. 3. c. 1. 1 *Hale* 514. 617. *Dalt. Inst.* c. 108.

In an indictment for forging an acquittance, it is not necessary to allege that any goods were delivered in consideration of such acquittance. The false making with intent to defraud, is the gist of the offence. A bill of parcels was given of the following tenor, viz. "Mr. John Ladd, bought of Eveleth & Child, 2.18 Swedes iron, \$4.80. the above charged to Geo. Carpenter," which bill the defendant altered by adding thereto the words "by order, Eveleth & Child"—it was held that this addition amounted to an acquittance of John Ladd, and was a forgery within the statute of 1804. ch. 120. s. 1.; that the addition purported to be an acknowledgment by Eveleth & Child. that the

forgery at common law, which is of the degree only of misdemeanor, there are a great many kinds of forgery, especially subjected to punishment by the enactments of a variety of statutes, which many years ago were spoken of as so multiplied as almost to have become general. (*d*)

*d* 4 Black Com. 218.

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goods delivered to the defendant, were charged to Carpenter, by his order, and that this amounted in law, to an acquittance or discharge of the defendant. *Commonwealth v. Ladd*, 15 Mass. Rep. 526.

To constitute a forgery of "an order for the delivery of goods" within the statute of 1804. ch. 20. s. 1. it is not necessary that the person whose name is forged, should have goods in the hands of the drawer. This point was settled in the case of the *Commonwealth v. Fisher*, 17 Mass. Rep. 46. The words of the order were "Mr. Parker—Sir, deliver my son, one pair of walking shoes, and charge the same to me.—Yours, James Fisher." The jury returned a special verdict, "that the said James Fisher had no goods or effects in the hands of the said Parker, when the order was made, or afterwards"—"but whether the order was, within the true intent and meaning of the statute, an order for the delivery of goods' the jury are ignorant and pray the advisement of the court," &c. It was argued for the defendant, that the paper recited in the indictment was not an "order for the delivery of goods," but a mere request; that the words in our statute are a transcript of the statute of 7 Geo. 2. c. 22. and that the judicial construction of that statute has been similar to that now contended for, 2 East. P. C. 923. *Foster's Cr. Law*. 119. *Leach*, 611. *Rex v. Clinch*, 363. *Rex v. Ellor*, 114. *Rex v. Williams*, 3 Chit. C. L. 1033. But by the court, "the language of our statute is similar to that of the statute, on which the English decisions are founded, and in favour of life the latter received a stricter construction than we think it necessary to give to our own, by which the life of the offender is not put in jeopardy. We are all satisfied that the facts found by the jury, bring the defendant within the statute upon which the indictment was framed; and that it makes no difference in the crime, whether the supposed drawee of the order has funds in the hands of the drawer or not." S. P. 2 Bay's Rep. 262.

In the case of the *Commonwealth v. Hutchinson*, 1 Mass. Rep. 7. it was unanimously decided by the court that the person whose signature is alleged to be forged, is not a competent witness to prove the forgery, *unless the instrument alleged to be forged, is produced at the trial*. The court said, that although the practice in England was now settled not to admit the person as a witness to the forgery whose name was forged, the practice in this state had been otherwise for a long time.

In a subsequent case, where nothing was alleged in the indictment as an excuse for not producing the instrument, on proof that it had been secreted by the prisoner, or his friends, the court permitted a copy to be given in evidence. The Ch. Justice observed, "that in this state for a period of thirty years at least, a witness has been considered as competent, both in criminal and civil prosecutions, unless he was interested in the event of the suit; in the present case, whether the defendant was convicted or acquitted, *Smith* (the person whose name was forged) might be sued on the note in question, as a genuine note; and the verdict upon this indictment could not be given in evidence; for although an instrument found to be forged, is retained on

These statutes, which, for the most part, make the forgeries, to which they relate, capital offences, will be mentioned in subsequent chapters. At present it will be attempted briefly to review the doctrine of forgery at common law, together

the files of the court, yet any person interested may have a copy, by which to form his writ, and a *duces tecum* to the clerk to bring the original into court on the trial; Smith was therefore properly admitted to testify, the objection against him going only to his credibility." *Commonwealth v. Snell*, 3 Mass. Rep. 82.

See the opinion of the court in this case upon another point, viz. in what cases the production of the instrument will be dispensed with. See also the case of the *Commonwealth v. Houghton*, 8 Mass. Rep. 107. in which it was decided, that in an indictment on the statute for having in possession more than ten counterfeit bank bills, it is necessary to describe the bills in the indictment, or to assign a sufficient reason why they are not described.

In the cases of *Commonwealth v. Bayley*, 1 Mass. Rep. 62., and *Commonwealth v. Stevens*, 1 Mass. Rep. 203, it was decided that it is not necessary to set out the ornamental parts of a bank bill, its devices and mottos, in an indictment for forging or uttering the bill.

CONNECTICUT.—In the case of *Bruce v. Ross*, 1 Day's Rep. 100. the following points were decided.—1. That a person injured by a forged note though the note was not forged in his name, may have an action on the statute for the forgery;—2. That an action on the statute to recover damages for a forgery, is not barred in one year by the statute of limitations;—3. That evidence that a note is in the hands of a defendant, and that it was forged, is admissible without producing the note; 4. That in such case it is unnecessary to give the defendant notice in the declaration, to produce the note.

NEW-YORK.—In the case of the *People v. Thompson*, 2 Johns. Ca. 342. it was decided that forging the following order, viz. "Captain Godfrey, Sir, the bearer, Mr. Richardson, being our particular friend, who has occasion to proceed from New-York to Philadelphia, we have requested him to call on you, desiring you to accept his draft on us, on demand, for fifteen dollars, your compliance will much oblige, Sir, Your humble servants, Gibbs & Channing,"—is not forging an order for the payment of money within the statute; but by a subsequent statute, Sess. 24. c. 54. such an order, or request, is declared to be forgery. The court in delivering this opinion, cited 1 Leach, 111. Fost. 19. Mitchell's case. 1 Leach, 134. Williams' case. 1 Leach, 365. Ellor's case. 2 Leach 615. Church's case. In all these cases, it was ruled that the order was not within the statute, because it did not purport to be the order of a person who had, or assumed to have authority to make it. The words of the statute of New-York, above referred to (Sess. 24. ch. 54.) are, "any warrant or order for payment of money or delivery of goods, whether such order purports to be the order of the owner of the goods or money specified therein, or of some person who claims an interest in the same, or of any other person, with intention to defraud," &c. The latter statute is said to have been passed in consequence of the construction given in this case to the former one.

A person indicted for forging "an order for the payment of money," is not intitled to a peremptory challenge, it being an offence under the statute, punishable only with imprisonment for a term of years. A bank check, will



with such principles and decided points as (though some of them may have arisen in prosecutions upon particular statutes) appear to be of general application. And, pursuing the order of the definitions above \*given, we may consider, [\*1412]

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fall within the description of "an order for the payment of money," and may be so described and alleged in an indictment for the forgery of it. With respect to the rule of admitting the person whose name is forged, as a witness on the trial for forgery, Kent, C. J. observes, "the ancient rule in England, that a witness whose name was forged, was incompetent to prove the forgery on an indictment, because he was interested in the question, still prevails in their courts, and was adopted by this court in the year 1794. The grounds or reasons of that decision are not before the public, and therefore we do not know them; it is probable the court assumed the English rule, as they found it then existing. But since that time, the question of interest in a witness, has been investigated and defined with more precision both in England and in this state. The rule now in all such cases, and I believe in almost all criminal cases, except in the case of a forged instrument, is that the witness is to be received, if he be not interested in the event of the suit, so that the verdict could be given in evidence in an action in which he was a party. The interest which the witness may have in the question put, is no longer the test. That degree of interest, goes only to the credit of the witness. The exclusion of the witness, in the case of forgery, has therefore become an anomaly in the law of evidence, for it is certain, that the conviction of the party charged with forging a check, cannot be given in evidence in a subsequent civil suit on the check; and as the reason of the old rule has ceased, by a sounder definition of the question of interest, and as it is not now applied to other criminal cases, it would seem to be fit and proper, that the rule itself should no longer be applied to the case of forgery." *The People v. Howell*, 4 Johns. Rep. 296. 302.

Forging a paper in the following words, "Mr. Seward—Sir, Let the bearer trade thirteen dollars, twenty-five cents, and you will much oblige yours, &c. Aug. 16, 1809. Samuel Layton"—was held to be an order for the delivery of goods within the statute (24 Sess. c. 54.) and the terms of it sufficiently explicit and intelligible. *The People v. Shaw*, 5 Johns. Rep. 236.

Since the act of Sess. 30 c. 173. s. 1. it is not a felony in this state to utter and publish a forged bank note of another state, of a sum less than one dollar; nor is a person possessing such a note with intent to utter it, indictable under the act of Sess. 31. c. 155. s. 7. Notes of this description are not absolutely void, for they may be collected of the bank by which they are issued; but the circulation of them in New-York is prohibited by the first mentioned statute. *The People v. Wilson*, 6 Johns. Rep. 320.

Forging an order in these words, "To the Cashier of Levi McKean's change office, pay to John Low or bearer fifteen hundred dollars, in N. Myers' bills or yours—David B. Leist," is not within the act to prevent forgery. The language of it is too indefinite; whether Myers' bills, or McKean's bills are money or goods, is wholly uncertain. It is not an order for the *payment of money*, nor for the *delivery of goods*. *The People v. Farrington*, 14 Johns. Rep. 348.—(Quære, is not such a fraud cheating by *false tokens*? Is not a cheat punishable at common law—Editor.)

Forging a deed within this state for lands lying in the Missouri territory, or in another state, is an indictable offence under the acts to prevent forgery.



I. of the *making or alteration* of a written instrument necessary to constitute forgery; II. of the *written instruments* in respect of which forgery may be committed; and, III. of the *fraud and deceit* to the prejudice of another's right. We may

(1 N. R. L. 405. 408.) It cannot be material where the lands lie, if the act of forgery, and the existence of the fraudulent intention, both concur and happen within this state. The prisoners have committed no offence cognizable by the laws of Missouri. The *corpus delicti* is here, and here the prisoners are punishable, or no where. The forgery of bills of banks in other states, when forged or uttered within this state *scienter*, has been punished as an offence within this statute. Such forgeries are punishable under the statute, on the sole ground that they are frauds upon our own citizens. The People *v.* Flanders & Haug, 18 Johns. Rep. 164.

PENNSYLVANIA.—The forgery of any writing which may be prejudicial to another, is indictable at common law. Pennsylvania *v.* McKee, Addis. 33, 34.

Forgery of a *name* to an assignment of a bond, is indictable, although there be no *seal* to the forged assignment, as it gives a possibility to defraud. A co-obligor may be guilty of forgery, in assigning a bill given by himself and another; but his possession of it may be evidence of an authority over it, and if there be no intention to defraud, it is not forgery. Pennsylvania *v.* Misner, Addis. 44.

Notwithstanding the expiration of the corporate powers of a bank, it is still an indictable offence and punishable within the act of April 22, 1794, to pass a counterfeit note of such a bank, knowing it to be counterfeit; and any forged note, counterfeiting a genuine note of a bank whose corporate powers have expired, is a counterfeit note of such bank. This was decided upon a writ of error brought against the Commonwealth by one White, who had been convicted of passing a counterfeit note of the bank of the United States. The objection to the indictment was, that at the time the offence was alleged to have been committed, the bank of the United States was not in existence; the period for which the stockholders were incorporated, having expired. The indictment was founded on the act of Pennsylvania of April 22, 1794. s. 5. by which it is made penal for any person to pass a counterfeit note of the bank of the United States, knowing it to be such.—“Although the corporation (the bank of the United States) was not in existence when this counterfeit note was passed, yet the genuine note represented by it, had a legal existence. The notes are still in circulation and the trustees in whom the stock was vested after the dissolution of the corporation, are bound to pay them. The act of Assembly on which this indictment was founded is still in full force; and even the act of Congress incorporating the bank of the United States, is for some purposes in force, although the corporation expired the 4th of March, 1811. But whether the notes were receivable in payments or not, they had a lawful existence until they were paid and cancelled.” Per Tilghman, C. J. in White *v.* The Commonwealth, 4 Binn. 418.

On an indictment for forging a receipt by adding a further sum, judgment was arrested after conviction, because the presumption, arising from the manner of stating the offence was, that the additional sum was added, (inserted) after the name, and so no one could be deceived by it. Pennsylvania *v.* McKee, Addis. 33. 36.

The offence of uttering, publishing, and passing a counterfeit bank note of another state with intent to defraud, is punishable by imprisonment at hard

then briefly treat, IV. of *principals and accessories*; and, V. of the *indictment, trial, evidence, and punishment*.

In the first place, however, it should be observed that the offence of forgery may be complete, though there be no publication or uttering of the forged instrument. For the very

A publication or uttering of the forged

labour, under the act of April 5, 1790, s. 4. "I see nor reason to doubt, that by the common law, this offence was subject to an infamous punishment; and that being the case, it falls within the 4th section of the act of 5th of April, 1790." Per Tilghman, C. J. in the case of *Lewis v. the Commonwealth*, 2 Serg. & Rawle, 551.

In the case of the *Commonwealth v. Searle*, 2 Binn. 332. the following points of law were settled.—1. That the *publishing* of a forged writing of a private nature, though not under seal, with intent to defraud, is an offence indictable at common law. This point was fully investigated and decided in the case of the *King v. Ward*, 2 Ld. Raym. 1461. 13 Geo. I. Since which the law has been considered as settled.—2. That to *utter and publish* a bank bill, is to declare or assert directly or indirectly, by words or actions, that the note is good; but that a note is not *passed* until it is received by the person to whom it is offered. It is not decided in this case whether the note would be *passed*, if the person to whom it is offered, receives it for the purpose of having it examined.—3. That the *publishing* of a counterfeit note of the bank of North America, is not an offence punishable under the act of April 22, 1794, (3 Smith's Laws, 189;) but it is punishable at hard labour, under the acts of April 5, 1790, (2 Smith's Laws, 531.) and April 4, 1807, (4 Smith's Laws, 393.) There is no doubt that this offence might have been punished by *setting in the pillory*, by virtue of the acts before mentioned, and therefore, that it is within them.—4. That in an indictment for publishing a counterfeit bank note, it is not necessary to set forth the ornamental parts of the bill, the devices or mottos. The court expressed their concurrence with both the cases decided in Massachusetts. *Commonwealth v. Bailey*, 1 Mass. Rep. 62.—and *Commonwealth v. Stevens*, 1 Mass. Rep. 203., where it was ruled to be unnecessary to set forth the devices and ornamental parts of a bill.

**SOUTH CAROLINA.**—The forging of a general indent of this state, is not made a capital offence by the act of Assembly, which authorizes the issuing of the same; but the forging a receipt on such indent for the accruing annual interest, which appears to be payable upon the face of it, with intent to give the indent currency, and uttering the same with intent to defraud, is felony without benefit of clergy, under the statute of 2 Geo. II. c. 25., which is of force in this state. *The State v. Washington*, 1 Bay's Rep. 120.

An indictment stating an offence to be against the state, and concluding with the words, "against the peace and dignity of the same," is good within the terms of the constitution of 1790. *Ibid.*

The last of these points was considered of no weight by the court. With respect to the first, it was argued, that the receipt charged in the indictment was not such as came within the act of March 5, 1736, made for putting in force part of the statutes of 2 & 7 Geo. II. The form of the receipt set forth in the different counts was as follows: "Received 14th Oct. 1785, two years interest on £86. 2s. 4d., the within indent—Thos. Reynolds.—£86. 2s. 4d." The clause of the statute on which the indictment was founded, is not recited in the report of the case: but it is supposed to be in these words, "any ac-

instrument, making with a fraudulent intention, and without lawful authority, of any instrument which, at common law, or by statute, is the subject of forgery, is of itself a sufficient completion of the offence before publication; and though the publication of the instrument be the medium by which the intent is usually made manifest, yet it may be proved as plainly by other evidence. (c) Thus, in a case where the note, which the prisoner was charged with having forged, was never published,

is not necessary to complete the offence of forgery.

c 2 East. P. C. c. 19. s. 4. p. 955.

quittance or receipt for money or goods." See 1 Brevard's Dig. 368. Tit. 82., where the statute of 2 Geo. II. c. 25, may be found.

It was contended that if counterfeiting the indent was not felony, counterfeiting the receipts upon the back of it, could not be felony. To this it was answered by the court that it is of no consequence on what the receipts were written; whether on the back of an indent, or on any other paper. If the receipt was for money and was forged with intent to defraud, that is sufficient to constitute felony. Ibid.

Forging a bill of the paper medium of this state, with two of the commissioners names only to it, does not constitute a capital offence, under the act of Assembly giving currency to such bills, which requires that such bills shall be signed by three commissioners. It is evident that any bills not signed by three commissioners, as the law directs, but signed by only one or two of them, would not be receivable at the treasury, because they are not such as the act requires and makes receivable there. And although there is no negative clause, which makes such bills void, yet they would have been void in law—for "*expressio unius est exclusio alterius*." It does not purport to be a true bill upon the face of it. (Ann Lewis' case, Fost. 116.) Moffat's case, 1 Leach C. C. 372. is directly in point. Per Bay, J. in the State v. Jones, 1 Bay's Rep. 207. 209.

If a special verdict states the passing of a forged note, *knowing of the forgery*, it is sufficient to warrant a judgment on the conviction, though such finding does not express that it was done with a fraudulent intention. For the fraudulent intention springs out of the knowledge of the forgery, as a natural consequence. The law will presume in *odium fraudis*, that it was done with a fraudulent intention. The State v. Fuller, 1 Bay's Rep. 245. The following authorities were cited in support of this decision. 12 Mod. 627. 2 Strange, 844, 5. 1 Leach 204. Donally's case; and 5 Rep. 97.

Forging an order for the delivery of goods, is felony within the meaning of the statute, though the party making the supposed order, has no goods in the hands of the drawer. It is of no consequence what the form or the tenor of the order may be, if it be false, and calculated to deceive and defraud: such an order is both within the mischief and the words of statute. West's case, tried at Charleston, in 1735, settled the doctrine in this state. The State v. Holly, 2 Bay's Rep. 262. 266. See ante, the case of the Commonwealth v. Fisher, 17 Mass. Rep. 46. where the same point was decided.

If an indictment states the offence to be against a British act of Parliament, made of force here, when in fact no such act has ever been made of force, instead of concluding against the act of the Legislature of the State, it is good ground to arrest the judgment. The State v. Holly, 2 Bay's Rep. 162.

ed, but was found in his possession at the time he was apprehended, no objection was taken to the conviction, on the ground of the note never having been published, there being in the case circumstances sufficient to warrant the jury in finding a fraudulent intention. (*f*) At the present time most of the statutes which relate to forgery make the publication of the forged instrument, with knowledge of the fact, a substantive offence.

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\*SECTION I.

[\*1413]

OF THE MAKING OR ALTERATION OF A WRITTEN INSTRUMENT NECESSARY TO CONSTITUTE FORGERY.

Not only the fabrication and false making of the whole of a written instrument, but a fraudulent insertion, alteration, or erasure, even of a letter, in any material part of a true instrument, whereby a new operation is given to it, will amount to forgery; and this, although it be afterwards executed by another person ignorant of the deceit. (*g*) And the fraudulent application of a true signature to a false instrument, for which it was not intended, or *vice versâ*, will also be forgery. (*h*) Thus it is forgery in a man who is ordered to draw a will for a sick person, to insert legacies in it of his own head. (*i*) So if a man insert in an indictment the names of those against whom, in truth, it was not found: (*k*) Or if, finding another name at the bottom of a letter, at a considerable distance from the other writing, he cause the letter to be cut off, and a general release to be written above the name, and then take off the seal, and fix it under the release. (*l*) And in a late case it appears to have been considered that if a party make a copy of a receipt, add to such copy material words, not in the original, and then offer it in evidence on a suggestion of the original being lost, he may be prosecuted for forgery. (*m*) The fraudulent alteration of a material part of a deed is forgery; as the making a lease of the manor of Dale appear to be a lease of the manor of Sale, by changing the letter D. into \*an S.; or the making a bond for five hun-

Of the making or alteration of a written instrument necessary to constitute forgery.

[\*1414]

*f* Elliott's case, 1777, 1 Leach 178. 2 East. P. C. c. 19. s. 44. p. 951. 2 New R. 93. note (*a*). And see also Crocker's case, 2 Leach 987. where it appears to have been holden by Le Blanc, J., that though the note there in question had been kept in the prisoner's possession, and never attempted to be uttered by him; yet it was a question for the jury under all the circumstances of the case, whether the note had been made innocently, or with an intent to defraud.

*g* 2 East. P. C. c. 19. s. 4. p. 855.

*h* *Id. Ibid.*

*i* Noy. 101. Moor 759, 760. 3 Inst. 170. 1 Hawk. P. C. c. 70. s. 2. 3 Bac. Ab. Forg. (A.)

*k* Rex v. Marsh and others, 3 Mod. 66. 1 Hawk. P. C. c. 70. s. 2.

*l* 3 Inst. 171. 1 Hawk. P. C. c. 70. s. 2. 3 Bac. Ab. Forg. (A.)

*m* By Lord Ellenborough, C. J., in Upfold v. Leit, 5 Esp. 100. The words inserted were "in full of all demands."

dred pounds, expressed in figures, seem to have been made for five thousand: (n) and though it seems to have been thought that a deed, so altered, is more properly to be called a false than a forged deed, not being forged in the name of another, nor his seal nor hand counterfeited; (o) yet, according to the better opinion, such an alteration amounts to forgery; on the ground that the fraud and villany are the same, as if there were an entire making of a new deed in another's name; and also that a man's hand and seal are falsely made use of to testify his assent to an instrument, which, after such an alteration, is no more his deed than a stranger's. (p) Altering the date of a bill of exchange after acceptance, and thereby accelerating the time of payment, would come with the same rule. (q) And, upon the principle that the false making of any part of a genuine note, which may give it a greater currency, is forgery: it was holden, in a modern case, that where a note of country bankers was made payable at their house in the country, or at their banker's in London, and the London banker had failed, it was forgery to alter the name of such London banker to the name of another London banker, with whom the country bankers had made their notes payable subsequently to the failure. The Judges held that the act done by the prisoner was a false making, in a circumstance material to the value of the note, and its facility of transfer, by making it payable at a solvent instead of a insolvent house. (r) And upon the general principle that the alteration of a true instrument makes it, when

[\*1415] \*altered, a forgery of the whole instrument, it was holden that where the indictment charged the prisoner with "making, forging, and counterfeiting" a bill of exchange, and with uttering it, knowing it to be forged; and the evidence was of an alteration of the bill of exchange from 10*l.* to 50*l.* in the part of it in which the sum is expressed in figures, and also in the part in which it is expressed in letters, the prisoner was properly convicted; though the statute, on which the indictment proceeded, 7 Geo. II. c. 22. contains the word *alter* as well as the word *forge*; "if any person shall falsely make, alter, forge, or counterfeit, or utter, or publish, as true, any false, altered, forged, or counterfeited, &c.;" from which it was contended that to *alter* a bill of exchange was made a distinct offence. (s)

n Moor 610. 1 Hawk. P. C. c. 70. s. 2. So in Ellsworth's case, 2 East. P. C. c. 19. s. 58. p. 986. where a cypher being added after the figure 8, the bill, which was for 8*l.*, became a bill for 80*l.*

o 3 Inst. 169.

p 1 Hawk. P. C. c. 70. s. 2. 3 Bac. Ab. Forg. (A) in the notes.

q Master v. Miller, 4 T. R. 320. 2 East. P. C. c. 19. s. 4. p. 853

r Rex v. Treble, 2 Taunt. 328, 333. 2 Leach, 1040. The alteration was effected by pasting a slip of paper bearing the words Ramsbottom and Co., over the words Bloxam & Co. in the same manner as the prosecutors had themselves altered their reissuable notes after the failure of their first London bankers, Bloxam & Co.

s Teague's case, cor. Le Blanc, J., Hertford Sum. Ass. 1802. Mich. T. 1802. 2 East.

The expunging, by means of lemon juice (laid in the indictment to be a certain liquor unknown to the jury), an indorsement on a bank note, was holden to be a *rasing* of the indorsement within the statute 8 & 9 W. III. c. 29. s. 36. which relates to the altering or rasing any indorsement on any bank bill, &c. (*t*)

Expunging an indorsement on a bank note.

In a case where the prisoner procured a deed to be forged, as from one J. M. and his son, conveying a certain estate for life to M. K.; and after the death of one of the supposed grantors, had procured the forged deed to be altered by enlarging the grantee's estate to a fee; and was convicted of forging and uttering it in the state to which it was so altered; this was holden to be well by all the Judges; as being no less a forgery after than before such alteration. (*u*)

Forgery and subsequent alteration of the deed.

\*It seems that a man cannot be guilty of forgery by a bare *non feasance*; as if in drawing a will he should omit a legacy which he was directed to insert: but it appears to have been holden that if the omission of a bequest to one cause a material alteration in the limitation of a bequest to another, as where the omission of a devise of an estate for life to one man causes a devise of the same lands to another to pass a present estate, which otherwise would have passed a remainder only, the person making such an omission is guilty of forgery. (*x*)

[\*1416]  
As to forgery by fraudulent omission in a written instrument.

A man may be guilty of forgery by making a false deed in his own name. Thus it has been holden to be forgery for a person to make a feoffment of certain lands to I. S., and afterwards make a deed of feoffment of the same lands to I. D. of a date prior to that of the feoffment to I. S.; for herein he falsifies the date in order to defraud his own feoffee, by making a second conveyance, which at the time he had no power to make. (*y*) And it is also said that his crime would have been the same if, by his conveyance, he had passed only an equitable interest for good consideration, and had afterwards by such a subsequent antedated conveyance endeavoured to avoid it. (*z*)

Making a false deed in a man's own name.

If a bill of exchange, payable to A. B. or order, get into the hands of another person of the same name with the payee, and such person, knowing that he is not the real payee, in whose favour it was drawn, indorse it, for the purpose of fraudulently possessing himself of the money, he is guilty of forgery. (*a*)

Indorsing a bill of exchange by person of the same name as the payee.

P. C. c. 19. s. 55. p. 979. The Judges held that the point was governed by Dawson's case, Mich. 3 G. I. 1 Str. 19. 2 East. P. C. c. 19. s. 55. p. 978. where the prisoner having altered the figure of 2 in a bank note to 5 (200*l.* to 520*l.*) ten of the Judges agreed that it was forging and counterfeiting a bank note; and that 3 Inst. 171, 172. was not law in this respect; for *non assumpsit* might be pleaded to such a note.

*1 Rex v. Bigg*, 3 P. Wms. 419.

*u* Kinder's case, 1800. 2 East. P. C. c. 19. s. 4. p. 855.

*x* Moor 762. Noy. 101. 1 Hawk. P. C. c. 70. s. 6. 3 Bac. Ab. *Forg.* (A) 2 East. P. C. c. 19. s. 4. p. 856.

*y* 3 Inst. 169. Pult. 46 b. 1 Hawk. P. C. c. 70. s. 2. 3 Bac. Ab. *Forg.* (A).

*z* 1 Hawk. P. C. c. 70. s. 2. 3 Bac. Ab. *Forg.* (A) in the notes, Moor 665.

*a* Mead v. Young. 4 T. R. 28.



Uttering a  
[\*1417] note made  
in the same  
name as  
that of the  
prisoner.  
Parkes'  
and  
Brown's  
case.  
Holden to  
be forgery  
to utter a  
note as  
the note of  
another,  
though  
made in  
the pri-  
soner's  
own name.

The uttering of a note, as the note of another person, has been holden to be forgery, though such note was made in the same name as that of the prisoner.

The point arose in the following case: two prisoners, named Parkes and Brown, were indicted for forging a promissory note, of which the following is a copy.

*Rington, Salop, April 20, 1796.*

No. B. 248.

I promise to pay to bearer, on demand, at Messrs. Down, Thornton, and Co's., bankers, London, the sum of Five Guineas, for value received. For Self and Co.

THOS. BROWN. (b)

FIVE GUINEAS.

Entered, T. B.

[\*1418] There was a second count for uttering the same, knowing it to be forged. The following facts appeared in evidence: the prisoner, Brown, uttered the note to one Hulls, a shoemaker, in part payment for a quantity of boots and shoes which he had bought, under pretence that he was a Captain Brown of 17th regiment, and going immediately to the West Indies. At the time when he bargained for the articles at Hulls's shop, he told Hulls that if he would send his boy with him he would send back the money: but Hulls declined this, and went himself with the prisoner. While on their way, Brown said that his brother was agent to the 17th regiment, and would buy all the shoes Hulls had: and, upon their coming to a public-house, he invited Hulls to go in, saying, he should see his brother presently. They then sat down together, on a bench in the garden of the public house; and Brown proceeded to speak further of his brother, who, he said, had just married a lady with a fortune of £15,000, and had deposited it in the hands of Down and Thornton. After some time, the brother not appearing, \*Brown went into the house, and returned again, using expressions of disappointment at the absence of his brother, and added: "I am sorry I cannot pay you in gold: but I can give you what is just as good, one of my brother's drafts, for which I have been into the house to get cash, but the landlord has not enough by him." He then produced the note in question, and gave it to Hulls, who asked if it was on the money lodged with Down and Co's., Brown said that it was; and added, that his brother and he always paid in that manner on demand, for they wanted no credit. He then appointed Hulls to meet him in the afternoon, at another place, where he would pay him the balance. The note was soon discovered to be a forgery, and Hulls

b The words, "I promise to pay the bearer on demand;" and also the words, "the sum of five guineas, for value received for Self and Co.," were printed in the note.

could hear nothing more of Brown. It further appeared, that Parkes and Brown were connected together ; and that when Parkes was taken up, more than forty of these five-guinea notes, in blank, were found upon him, dated Rington, Salop ; and a few of the same sort of notes were also found concealed under a board in a shop where the prisoner Brown was arrested; and which it was probable he had thrust there. The note in question was proved to be filled up in the hand-writing of Parkes ; and the name Thomas Brown was also in the hand-writing of Parkes. In Parkes's pocket-book was found a receipt under a cover, addressed to Thomas Brown, at the Compter, (the prison to which Brown had been committed,) for 21*l.*, for four five-guinea bills. It was also proved that Down and Co. had no such customer as Thomas Brown, of Rington in Shropshire ; and there was no evidence that the prisoner Brown had any residence or connection at that place. Upon this evidence the jury found both the prisoners guilty ; and stated that they thought Parkes signed the note in question with Brown's assent, and that Brown uttered it under a representation that it was his brother's, knowing that it was not so, with intent to defraud Hulls. The following objections to the conviction were then taken by the counsel for the prisoner : first, that the name *Thomas Brown* was the real name of one of the prisoners ; secondly, that it was no forgery in Parkes to sign \*the name of Thomas Brown, with his consent ; thirdly, [\*1419] that if Parkes were not guilty of forgery, Brown could not be guilty of uttering the note knowing it to be forged ; and, fourthly, that the subsequent misrepresentation of Brown ought not to affect Parkes, as there was no evidence that he was aware of the fraudulent circumstances under which Brown would utter the note : the principle being, that misrepresentations do not amount to forgery, or make that a forgery which was not so at the time of the original making.

These points were submitted to the consideration of the twelve judges, who held the conviction wrong as to Parkes, on a ground irrelevant to the subject now under consideration ; but all of them held the conviction right as to Brown : and Grose, J., afterwards delivered their opinion. "He observed, as to the first objection, that the definition of forgery was, 'the false making a note, or other instrument, with intent to defraud ;' (c) which might be done either by using the name of one who did not exist, or of one who did exist, without his consent. That this was of the former description ; being uttered by the prisoner as the note of his brother, no such person as his brother of that name appearing to exist : and that the circumstance of its being made in the same name as his own could not make any difference ; being uttered as the note of another. and not his

[\*1420]

own. The same answer applied to the second objection. As no such person existed to whom the name of Thomas Brown, *as the signer of the note*, applied, there could be no consent given to sign the name. It was signed by the authority of *a* Thomas Brown, but not of *the* Thomas Brown for whose note it purported to be given. For the person in whose name the note was made was, according to the description of him in the note, then a resident at Rington, in Salop; and it imported that he was a correspondent of Down, Thornton, and Co., and had money in their hands; and he was also represented to be *\*the brother of the prisoner*; but no such person of that name and description appeared to exist. And all this was proved and found to be done for the purpose of fraud. Thirdly, that the indictment did not charge that Brown uttered the note knowing it to have been forged *by Parkes*, but only knowing it to have been *forged*; and, therefore, let it have been forged by whomsoever it might, it was equally an offence in Brown to utter it." (d)

Doubt suggested upon the preceding case.

The foregoing case has been observed upon by a learned writer, who says that, though supported by the highest authority, it has always appeared to him to rest upon very questionable principles. (e) And he cites a case, where upon the facts that a bill made by the prisoner D. Walker, (who was a pauper at Manchester) was dated Liverpool, signed D. Walker and Co., and drawn on Devaynes and Co. London; and that similar bills had been before drawn in the same manner, and, being provided for before due, had been regularly paid, although the drawer was unknown to the house; the case in question was cited as an authority: but the learned Judge ruled, that the evidence was not sufficient to go to the jury. (f) And, in discussing the effect of a false representation, he refers to the following case, where the prisoner assumed to be the real indorser of a bill; yet, as there was no false making, it was holden not to be forgery; though the act was done in concert with the real indorser, and for the purpose of fraud. (g)

Hevey's case. The prisoner assumed to be the real indorser of

The prisoner, John Hevey, was indicted for forging an indorsement on the back of a bill of exchange, in the name of Barnard M'Carty, with intent to defraud Wm. Masters *\*and Edward Beauchamp, &c.*; and the indictment contained a second count, for uttering and publishing a forged indorsement in the name of Barnard M'Carty, with the like inten-

*d* Parkes and Brown, (case of) 1796, 1797. 2 Leach 775. 2 East. P. C. c. 19. s. 49. p. 963. Brown accordingly received sentence of death, but was not executed. 2 Leach 788.

*e* 6 Ev. Col. Stat. Pt. V. Cl. XII. p. 580.

*f* Walker's case, *cor.* Chambre, J., *Lancaster*, about the year 1807. *Id. Ibid.*

*g* This appears to be a false pretence within the statute 30 Geo. II. c. 24. *Ante*, 1382. 1390.

tion. The bill of exchange in question was in the following form :—

“No. 59.

£ 30.

*Bath Bank, Nov. 19th, 1781.*

Thirty one days after sight, pay Mr. Barnard M'Carty, or order, thirty pounds value received, for Smith, Moore, and Co.

Jer. Connell.”

“To Rich. Beatty, and Co.  
No. 19, Great St. Helen's, London.”

a bill : but as there was no false making, it was holden not to be forgery, though the act was done in concert with the real indorser, and for the purpose of fraud.

It appeared in evidence, that the prisoner came to the shop of Beauchamp and Masters, who were pawnbrokers, to buy a watch, and offered them the bill in question, with the indorsement then written on it ; that they hesitated about taking it, upon which he told them it was a good bill, that his name was Barnard M'Carty, that he had indorsed it, and that Beatty and Co., by whom the bill purported to be accepted, were agents to the Bath bank. The pawnbrokers were not satisfied, and sent their servant to St. Helen's, to inquire about the acceptance ; but upon his returning and saying that he had seen a person at St. Helen's who said the acceptance was good, they let the prisoner have the watch, and gave him the difference of the bill. It was then proved, that the prisoner had procured the plate to be engraved some time before, containing the form of the bill in question, and had printed several hundred copies ; that he had always been known by the name of John Hevey ; and that no such person as Smith, Moore, and Co. could be found in Bath ; though there were such names put on the door of a house, from whence the person who had been there had run away. It was proved also, that the names of Beatty and Co. were on a counting-house door in Great St. Helen's, where a man of the name of Beatty, who said he \*was a clerk, had lived ; but was since taken up and lodged in prison. And it further appeared, that there was such a man as Barnard M'Carty, and that the indorsement was in fact of his hand-writing. Upon this evidence the jury, under the direction of the learned Judge, who tried the prisoner, found a verdict of guilty, and found specially that there was such a person existing as Barnard M'Carty, and that the indorsement was of his hand-writing ; that the prisoner was not that person, but had passed himself upon the prosecutors as such at the time he tendered the bill in payment. The case was afterwards submitted to the consideration of the twelve Judges, who were all of opinion, that it did not amount to forgery ; for there was no false indorsement ; the jury having found that the indorsement was

[\*1422]

truly made by a real person whose name it purported to be. (h)

Cases in which a party committing forgery has used a name different from his own.

Assuming the name of a person really existing.

Dunn's case. Where a note charged to

[\*1423]

be forged, though made by the prisoner in an assumed name and character, was her own note made and offered as her own, and not as the note of another in contradistinction to herself, the offence was holden to be forgery.

The cases in which a party committing forgery has used a name different from his own, consist either of those in which the name used has been of a real existing person, or those in which the name used has been of a person non-existing and fictitious.

It is said to be clearly settled, that in the case of forgery committed in the name of a person really existing, it matters not, whether the offender pass himself off upon the parties at the time for such person, and receive credit from them as such; the credit in such case not being given to the impostor personally without any relation to another, but to that other person whom he represents himself to be. (i)

The prisoner, Elizabeth Dunn, was indicted for forging the following promissory note, with intent to defraud Edward Hooper.

\**London, 27th July 1765.*

I promise to pay to Mr. Edward Hooper, the sum of *three* (the word *pounds* being omitted) thirteen shillings and sixpence, or order, seven days after date value received by me

her  
Mary ~~M~~ Wallace.  
mark

Witness John Whattal.

The facts were, that in June 1765. the prisoner applied to Hooper, at his office for receiving seamen's wages, calling herself Mary Wallace, and desired him to advance her money, to pay the fees for the probate of her husband's will, which was in the hands of a proctor. She returned soon after with the probate of the will of John Wallace, therein described to be a seamen on board the *Epreuve*; when Hooper required her to produce a certificate to shew that she was the Mary Wallace named in the will. A few days afterwards she brought a certificate, and pressed Hooper to lend her money on the credit of the wages due to J. Wallace; when he let her have three guineas and a half, and wrote the body of the promissory note in question, to which she subscribed her mark; after which his clerk attested it. She was then asked what name he was to put to her mark, to which she answered, "You know my name, you may write Mary Wallace;" which he did. It was proved clearly that her name was Elizabeth Dunn, and that the

*h* Hevey's case, *cor.* Ashhurst. J. O. B. 1782. 1 Leach 229. 2 East. P. C. c. 19. s. 1782, and considered by the Judges in Hil. T. 5. p. 356.  
2 East. P. C. c. 19. s. 42. p. 262.

whole account was a fabrication. Upon this evidence, the jury were directed to find the prisoner guilty, if they believed that she subscribed the note produced in a false name, either by a mark intended by her to express such false name, or by words at length, with intent to defraud Hooper; and the jury accordingly found her guilty. Judgment was then respited upon a doubt, whether as the note, though made by the prisoner in an assumed name and character, was her own note, made and offered as her own, and not as the note of another, in contradistinction to herself, the offence \*amounted to forgery. But upon the case being [\*1424] submitted to the consideration of the Judges, nine of them were of opinion that the prisoner was properly convicted. (k)

This case appears to have proceeded upon the ground of the prisoner having assumed the character of executrix of Wallace, a real person actually entitled to wages. Amongst the principles there laid down, it appears to have been holden, that if a note be given in the name of another person who is either really existing, or represented so to be, and in that light it obtain a superior credit, or induce a trust which would not have been given to the party himself, it is then a false instrument and punishable as forgery; and that the law would be the same, though the note or security were thus falsely subscribed in the presence of him who lent his money upon it, if the impostor and the party whose name is made use of were both strangers to him; for then he could not know that such impostor was not really the person whose name he assumed, and therefore the other would be equally deceived. (l) But this case occurred, before any decision had established the principle, which will be presently noticed, of the use of a mere fictitious name being of itself sufficient to constitute a forgery. (m) And it is observed, that after \*the authorities by which it was settled, that such a case was [\*1425] within the acts respecting forgery, it would have been quite sufficient to have shewn, that the prisoner with a fraudulent intent signed a promissory note, in the name of Mary Wallace; and it would have been unnecessary to resort to the

*E Dunn's case*, O. B. 1765, and Mich. T. 1765. 1 Leach 57. 2 East. P. C. c. 19. s. 49. p. 962. Two of the Judges were absent, and Aston, J. did not concur in the opinion.

12 East. P. C. c. 19. s. 48. p. 961.

Indeed the contrary proposition appears to have been taken for granted, in one report of this case where, in the opinion of the nine Judges who thought the case amounted to a capital forgery, the following passage occurs. "In this respect the case is very different from that of a person borrowing money upon his own note, and merely assuming a ficti-

tious name, without any relation to a different person; for there the whole credit is given to the party himself; the lender accepts the security, as the security of that person only; he has no other remedy in view but merely against the man he is dealing with; and the security itself is really and truly the instrument of the party whose act it purports to be, however subscribed by a fictitious name; he has, therefore, a remedy upon it against the person on whose credit he took it, and consequently is not substantially defrauded." *Dunn's case*, 1 Leach 60.



additional circumstance of the fraudulent object being to obtain credit in respect of money actually due to the deceased John Wallace, of whom Mary was falsely alleged to be the representative. (n)

Hadfield's case. Assuming the name and character of an existing person, and drawing a bill of exchange, holden to be forgery.

In a case where the prisoner was convicted and executed, for forging a bill of exchange, the facts were, that he had appeared in the neighbourhood of the lakes in Cumberland, pretending to be the Hon. Alexander Augustus Hope, brother of the Earl of Hopetoun, and in that name induced a young woman to marry him, and imposed upon several persons in the neighbourhood; and that, during such residence, he drew the bill in question upon a gentleman to whom he was known by that name, and who probably would have paid the bill, if the grand deception had not in the mean time been discovered. It is observed, as a material ingredient in this case, that the prisoner assumed the name and character of a really existing person. (o)

Assuming the name of a non-existing fictitious person.

With respect to the cases in which the name used has been that of a non-existing and fictitious person, it is laid down, as a clear proposition, that the making of any false instrument which is the subject of forgery, with a fraudulent intent, although in the name of a non-existing person, is as much a forgery, as if it had been made in the name of one who was known to exist, and to whom credit was due. (p)

[\*1426]

Lewis's case. Uttering a forged deed purporting to be a power of attorney from a non-existing person.

\*In a case where the prisoner was indicted on the statute 2 Geo. II. c. 25. for uttering a forged deed, purporting to be a power of attorney, from Elizabeth Tingle, administratrix of her father Richard Tingle, deceased, late a marine belonging to his majesty's ship the Hector, to F. Predham, of Bernard's-inn, &c. empowering the said Predham to receive all prize money due to her, &c. the facts were clearly proved, and the prisoner was convicted. But a doubt was entertained, whether as Richard Tingle had died childless, and as there was no such person as Elizabeth Tingle, the case amounted to forgery; and the point was referred to the consideration of the twelve Judges. Eleven of them were very clearly of opinion, that the case was within the letter and meaning of the act. (q)

Indorsing a fictitious name on a bill of exchange

A person indorsing a fictitious name on a bill of exchange to give it currency, will be guilty of forgery: and in a case which was stated to the Judges, they were all of opinion, that a bill of exchange drawn in fictitious names, when there

n 6 Ev. Col. Stat. Pt. V. Cl. XII. p. 579.

o Hadfield's case, *Carlisle* 1803. 6 Ev. Cel. Stat. Pt. V. Cl. XII. p. 580.

p 2 East. P. C. c. 19. s. 46. p. 957.

q Lewis's (Anne) case, O. B. 1754. *Fost.* 116. It is stated that the doubt arose from the passage in 3 Inst. 169. where Lord Coke,

speaking of forgery, says "this is properly taken when the act is done *in the name of another person.*" But it was thought that Lord Coke's description of the offence, on which the doubt was grounded, was apparently too narrow. *Fost.* 116. 117.

are no such persons existing as the bill imports, is a forged bill within the statute 2 Geo. II. c. 25. (r) may be forgery.

In the following case, the general proposition, that the use of a mere fictitious name is in itself sufficient to constitute forgery, was first established. (s) The prisoner, James Bolland, was indicted for forging an indorsement in the name of James Banks, on the back of a promissory note for £100. drawn by Thomas Bradshaw, and indorsed by \*Samuel Pritchard; with intent to defraud F. L. Cardeneaux. Another count charged him with uttering the same, knowing, &c. It appeared that the drawer and payee of the note in question were real persons; and that when the note came into the hands of Bolland, he indorsed it in the first instance with his own name, and attempted to negotiate it to one Jesson, with whom he had had money transactions: but that, upon Jesson saying that he should not be able to negotiate the note with Bolland's indorsement on it, he said, he could take his name off. Immediately another person in company began to erase the name. After he had scratched off all but the initial letter B., Bolland said, "Don't scratch it all out; it may disfigure or cancel the note; I will think of some other name that begins with a B.;" and immediately made the name *Banks*. Jesson then took the note; and saying that he should be asked who James Banks was, Bolland said, he was a publican of Rathbone place. Jesson soon afterwards applied to Cardeneaux to discount the note, and obtained from him some money on the credit of it; and being pressed by Bolland shortly after for the amount of the note, he took him to Cardeneaux, and introduced him as the owner of the note. Cardeneaux inquired who Banks was; to which Bolland answered that he was a man of property, who dealt largely in wines and spirits, and lived in Rathbone-place. Cardeneaux then gave him the amount of the note, in notes and cash; and did not ask him to indorse the note, Jesson having before told him, that it was better that Bolland's name should not appear on it, as he had been a sheriff's officer, and the note would not pass properly with his name upon it. It further appeared, that Bradshaw and Pritchard having become bankrupts before the note was payable, Cardeneaux applied to Bolland, when Bolland denied having discounted any note with him, and said, that his name was James Bolland, that he had never seen Cardeneaux before in his life, and that he had no note with his indorsement on it; and when Cardeneaux insinuated that he was acquainted with his having altered his name, he disregarded it. After the prisoner was taken up, some person

Bolland's case. The use of a mere fictitious name is sufficient to constitute forgery. [\*1427]

r Wilks's case, *Bodmin*, 1767. In consequence of this opinion, the prisoner was tried

cor. Yates, J. but the jury acquitted him. 2 East. P. C. c. 19. s. 46. p. 958.

s See Dunn's case, *ante*, 1424. note (m).

\*paid the £100. to Cardeneaux in the name of James Banks; but no such person as James Banks of Rathbone-place appeared to exist. The jury found the prisoner guilty. After conviction and judgment of death, the case was referred to the Judges: and the prisoner was afterwards ordered for execution, and suffered accordingly. (t)

Lockett's case. A forged order on a bank, in a fictitious name, amounts to forgery.

Very shortly afterwards a case occurred in which it was holden that a forged order on a banker, for the payment of money, purporting to be made by one who kept cash with him, was within the statute 7 Geo. II. c. 22., though made in a fictitious name, or in the name of one who had no authority to draw on him. (u)

It is agreed to be immaterial whether any additional credit be gained by using the false name.

Taft's case. It is forgery to indorse a bill in a fictitious name, although the money might have been as well obtained by indorsing it in the real name of the person who uttered it. It is immaterial, therefore, whether any additional credit be gained by using the false name.

The prisoner, Edward Taft, was tried for forging an indorsement on a bill of exchange, for fifty pounds, in the name of John Williams: and, having been found guilty, the following case was submitted to the consideration of the twelve Judges. The bill of exchange was drawn payable to the order of Messrs. Renwicke and Mee, by whom it was indorsed generally, and it afterwards became the property of one William Wheelwall, out of whose pocket it had been picked or lost, with other things, at Leicester races, on the 16th September, 1776. The prisoner had, on the same night, endeavoured to negotiate it at Leicester; but, being disappointed, he proceeded to Market Harborough, where he bought a horse of the landlord of the inn, and offered him the bill to change. The landlord, not having cash sufficient in the house, carried it to a banker's in the town, where the clerk told him that it was very good paper, for that he knew the payee who had indorsed it, and that if he, (the landlord,) would put his \*name on the back of it, it should be immediately discounted. The landlord, however, not knowing the person from whom he had received it, refused to indorse it; but told the clerk that the gentleman was then at his house, and he would go and fetch him. He accordingly went to the prisoner, who accompanied him to the banker's, where the clerk told the prisoner that it was the rule of their house never to take a discount-bill unless the person offering such bill indorsed it; but that if he would indorse the bill in question, it should be discounted. The prisoner immediately indorsed it by the name of "John Williams:" and the banker's clerk, after deducting the discount, gave him the cash for it. The prisoner's name was not John Williams. The Judges were unanimously of opinion that this was a forgery within the statute on which the

t Bolland's case, O. B. 1772, 1 Leach, 33.

u East, P. C. c. 19, s. 46, p. 958.

v Lockett's case, 1772, 1 Leach, 24. 2

East, P. C. c. 19, s. 38, p. 940.; and S. P. in Abraham's case, 1771, 2 East, P. C. 240.

indictment was framed; for, although the fictitious signature was not necessary for the prisoner's obtaining the money, and his intent in writing a false name was probably only done to conceal the hands through which the bill had passed, yet it was a fraud both on the owner of the bill, and on the person who discounted it; as the one lost the chance of tracing his property, and the other lost the benefit of a real indorser, if by accident the prior indorsements should have failed. (x)

In a case which occurred shortly afterwards, it was holden that a receipt, indorsed on a bill of exchange in a fictitious name, is a forgery, although it do not purport to be the name of any particular person. The prisoner, Taylor, was indicted for that he having in his possession a bill of exchange, in the words and figures following—

“SIR, *Tamworth, 2d August, 1779.*  
One month after date please to pay to my order,  
\*the sum of Twenty Pounds, value received, as per  
advice from

THOMAS HARPER.”

“To Mr. JOSEPH CUFF,  
No. 125, Whitechapel,  
London.”

feloniously did make, forge, and counterfeit, a receipt and acquittance, for the said sum of twenty pounds, as followeth, “Recd., W. Wilson;” with intention to defraud the said Joseph Cuff. A second count stated, an uttering with the like intention; and the third and fourth counts were, for forging and uttering it with intent to defraud John Briggs, and Henry Sutton. The facts were, that the bill was indorsed in blank, and delivered to Sutton, out of whose possession the prisoner obtained it by some undue means, (which did not appear,) and presented it for payment when it wanted two or three days of becoming due; that he offered to give a trifle to adjust the difference, and accordingly gave the drawee, Cuff, a shilling for the discount: that Cuff then desired him to write a receipt on the back of the bill, which he did, by writing the receipt in question, in the fictitious name of Wilson. Upon this evidence, it was submitted to the court that this was not a receipt for money within the meaning of the statute for that it was essential to the commission of forgery that the act should be done in the name of another; but that, in the present case, for any thing that had appeared to the contrary, there never was such a person ex-

Taylor's case. It is forgery to give to the drawee of a bill of exchange a receipt in a false name, as for the prisoner's own name, [\*1430] for the contents of the bill, such bill being indorsed in blank, if it be done fraudulently and to escape detection, although no additional credit be thereby gained to the prisoner.

x Taft's case, 1777, 1 Leach, 172. 2 East. P. C. c. 19. s. 47. p. 959. The Judges also referred to the case of Rex v. Lockett. (*ante*,

1428,) as having decided that the forging a name either of a real or of a fictitious person, with intent to defraud, was forgery.

isting as the “William Wilson,” whose name was supposed to have been forged. It was also submitted, that the name “William Wilson” could not have been used with an *intention to defraud*, because no receipt at all was necessary, nor was the prisoner compellable to give a receipt, and he might as well have procured payment of the bill by writing the receipt in the name of “John Taylor,” as in the name of “William Wilson;” the possession of the bill being a sufficient discharge to the drawee. That, therefore, as the discharge to the drawee was not any way strengthened by [\*1431] \*the receipt the prisoner had given, the use of the fictitious name, which was not necessary to the accomplishment of any fraud, was of no effect. And it was further urged, that the prisoner gained no additional credit by the name he assumed; and that what he had written was a mere memorandum, and did not operate as an acquittance against any person but the man himself who received the money, and who would be equally estopped by it as if he had written his own name. But the objections were over-ruled by the court, upon the ground that, as this was a *false receipt*, the case was clearly within the statute on which the indictment proceeded. And, after observing that the prisoner knew he had obtained the bill fraudulently; that, the better to elude enquiry after him, it was necessary to conceal his name; and that his object was to defraud the real owner of the bill of its value; they held that, if he intended to defraud any body by the fictitious signature, it was sufficient to constitute forgery. The jury having found the prisoner guilty, the judgment was respited, and the case referred to the consideration of the twelve Judges; eleven of whom were of opinion that, though the prisoner did not gain any additional credit by signing the name “*W. Wilson*” to the receipt, as the bill was not by the indorsement made payable to the person whose name was used, yet still it was a forgery; for it was done with intent to defraud the true owner of the bill, and to prevent the person receiving the money from being so readily traced. (*y*)

The following proposition is stated as having been the subject of much difference of opinion:—“That, if a person give a note, or other security, as his own note or security, and the credit thereupon be personal to himself, without any relation to another, his signing such a note with a fictitious name may indeed be a cheat, but will not amount to forgery; for, in [\*1432] such a case, it is really the instrument \*of the party whose act it purports to be, and the creditor had no other security in view.” (*z*)

*y* Taylor’s case, O. B. October 1779, and M. T. 1779. 1 Leach, 214. 2 East. P. C. c. 19. s. 46. p. 960. Buller, J., doubted.

*z*. One of the principles laid down in Dunn’s case, 1765, 2 East. P. C. c. 19. s. 48. p. 961. *Ante*, p. 1422. *et sequ.*

In one case, where the credit was without doubt given personally to the prisoner, the security tendered being considered as his alone, the Judges agreed unanimously that the offence amounted to forgery. The prisoner was indicted for uttering the following order for payment of money, knowing it to be forged, with intention to defraud James Elliott. (a)

*Green-street, 31st July, 1781.*

“SIRS,—Pray pay to Mr. John Atkins, or bearer, Six Pounds Six Shillings; value received.

Your's, &c.

H. TURNER.”

“To Messrs. Brown, Collinson, and Co., Lombard-street.”

The following facts appeared in evidence. The prosecutor was a silversmith; and the prisoner, having looked out several goods at his shop, to the amount of six guineas, pulled out his purse, as if going to pay for them, saying, “I believe I have not cash enough about me, but here is a draft on a banker, which is the same thing as money, for it will be paid when presented.” He accordingly laid the draft on the counter, and desired to see some silver spurs; but the prosecutor, not having any of the kind which he described, the prisoner said that he must send him a pair. Mr. Elliott looked at the draft as it lay on the counter; and seeing it was upon a house he knew, he took it, the sum being a small one, and the prisoner having a genteel appearance: and he then took his order-book, for the purpose of making a memorandum of the prisoner's direction; and supposing \*his name to be the same as that in which the draft, which he conceived to be the prisoner's, was signed, he wrote, “H. Turner, Esq.” The prisoner looked over him, and desired him to add, “Junior, Noah's Row, Hampton Court,” and then went away. Mr. Elliott further stated, that he gave credit to the prisoner, and not to the draft. It appeared that no person of the name of H. Turner kept cash at Brown and Collinson's, or lived in Green-street; nor could such a place as Noah's Row, or such a person as H. Turner, jun., be found at Hampton Court. Upon these facts the jury found the prisoner guilty, and he received judgment of death; but the execution of the sentence was respited on a doubt whether, as Mr. Elliott had sworn that he gave credit to the prisoner, and not to the draft, it could amount to the crime of forgery. The twelve Judges were unanimously of opinion that the conviction was right; for it was a false instrument, not drawn by any such person

Sheppard's case; holden to be forgery to draw a draft upon a banker in a fictitious name, assumed by the party at the time for the purpose of fraud, and to avoid detection, though the credit were given to the person of such party.

[\*1433]

a In the report of the case in 2 East. P. C. c. 19. s. 50. p. 967., it is stated that the prisoner was indicted for *forging* the order. Pro-

bably there were counts for forging, and for uttering the order knowing it to be forged.



as it purported to be, and the using a fictitious name was only for the purpose of deceiving. (*b*)

But the following case, which occurred only a few years afterwards, is mentioned as one in which the Judges were much divided in opinion, though not easily to be distinguished in principle from that which has been just cited.

The prisoner, J. H. Aickles, was indicted for forging a promissory note, in the following form, with intent to defraud one R. H. Gedge. A second count charged him with uttering such note, knowing it to be forged.

Aickles's case. It appears to have been doubted whether it was forgery where the prisoner, whose name was Aickles, had a month before taken

“ *London, Dec. 18, 1786.*

Three months after date, I promise to pay to H. Byron, Esq., or order, £25. 10s. 0d. value received.  
£25. 19s. 0d.

JOHN MASON,

No. 4, Argyle-street, Oxford-road.”

[\*1484] the house in which he lived in the name of Mason, and passed off a promissory note in that name, which he avowed to be his, dated some time before, but not payable till after the time of his trial: though the jury found that he assumed the name of Mason, by which he was never known before, for the purpose of the fraud.

\*It appeared that the note in question was, on the 9th of January, 1787, tendered by Byron to Gedge's shopman, in payment for some linens that were shewn by him to Byron. Upon being asked who John Mason was, Byron described him as a gentleman of fortune, with whom he was concerned in a coal-mine, living at No. 4, Argyle-street. The shopman declined leaving the goods with him; but promised to send them, if, upon enquiry, the note were good. He immediately went to No. 4, Argyle-street, and inquired for Mr. Mason; the prisoner appeared, and said his name was John Mason, and that the note was drawn by him, and should be paid when due. It was proved that, before the 9th of January, the prisoner had taken the house No. 4, Argyle-street, in the name of John Mason, Esq., and that the person who let the house had enquired concerning him, by this description, at the British coffee-house, and received a favourable account of his character. It was then proved that he had always passed by the name of John Henry Aickles, and had been tried several times at the Old Bailey, and was known by that name since the year 1780, until the present time. Upon this evidence, Grose, J., who tried the prisoner, entertained some doubt, and directed the jury that they could only convict the prisoner in case they believed that this note was drawn by him, in consequence of a concerted scheme, between him and Byron, to defraud Gedge, that the prisoner had never gone by the name of John Mason before, and had assumed it for the purpose of this fraud. And he said that, if they were satisfied on these points, they might find the facts, and he would state them to the Judges. Thereupon the jury found specially, that the prisoner in-

*b* Sheppard's case, O. B. Sept. 1781. Mich. T. 1781. 1 Leach, 226. 2 East, P. C. 19. s. 50, p. 967., where it is said that Taylor's case, (*ante*, 1429,) Lockett's case, (*ante*, 1423,) and Dunn's case, (*ante*, 1422,) were relied on

tended to defraud Gedge, and assumed the name of Mason for the purpose of this fraud; that he had never gone by that name before; and that they disbelieved a witness on the part of the prisoner, who had deposed that, two years before, he was inquired for and known by that name at the \*British coffee-house. On this a verdict of guilty was taken [\*1435] by consent, subject to the opinion of the Judges on the case.

The opinion of the Judges was pronounced upon this case by Ashhurst, J., to the effect that it did not amount to forgery. But the judgment appears to have been given under a misconception that the Judges had so decided; when, in fact, the case had been adjourned for further consideration. (c) It afterwards underwent further discussion, when many of the judges seemed to entertain an opinion that it was forgery; but several thought otherwise; and they never came to any final resolution on the matter. (d)

The following reasons are given as those upon which Gould, J., and the other Judges who coincided with him, thought that the case amounted to forgery. There was an apparent design for fraud in general; and the jury were satisfied that the prisoner had assumed the name of Mason, which was not his name, nor had ever been used by him before, but always Aickles, with intent to defraud Gedge. He, therefore, made the note in the name of another, as if his own, and clearly with an intent to defraud. Whether there existed a person of that name or not was immaterial; the felony consisted in the intent to defraud under the falsity. One might assume a feigned name, and make a draft in it, and yet innocently; as if he concealed himself to avoid arrest, and had appointed his friend on whom he drew to pay his bills; or, giving notes, took care to pay them when due. But the prisoner, having no such intention, but, on the contrary, to defraud the party, by making the note under such disguised name, by which, after he left the place of concealment, he could not be traced; the case \*amounted to forgery. There [\*1436] was no ground, he thought, to distinguish this from the common case where the draft is made in the name of a person who does not exist. It was in reality a deeper fraud, because the entity of such drawer would at once be disavowed at the place of his supposed residence; whereas, in the present case of a note, there would be no circumstance to find out the maker when he quitted the place where he made the note.

Reasons upon which it was thought that the foregoing case amounted to forgery.

The Judges, who inclined against the conviction, went on the doubt whether, to constitute forgery, it was not necessary that the instrument should be made as the act of ano-

Reasons against the conviction.

c 2 East. P. C. c. 19. s. 50. p. 969. 1 Leach, 440.

d Aickles's case, 1787, 1 Leach, 438. 2 East, P. C. c. 19. s. 50. p. 968. The prisoner was

remanded upon a former sentence; having, previously to the present charge, been tried for returning from transportation, and acquitted.

ther, (e) according to the definition of Lord Coke, whether that other existed or not. Whereas, here the note was made as the prisoner's own, and avowed by him to be so. The credit was given to the person, and not to the name; and the person, and not the name, was the material thing to be considered. (f)

[\*1437] Sir E. H. East enters at some length into the discussion of this point; and endeavours to ascertain the grounds upon which the Judges, who inclined against the conviction, might possibly have proceeded. But he again repeats, that it seems very difficult to distinguish the case from that of Sheppard: and he says that he cannot help suspecting that much of the difficulty in these cases arises from mistaking matters of fact for matters of law, and confounding the two together. (g) A learned writer, who has been several times referred to in the latter part of this work, observes, that it may be difficult to admit that the case involved any real ground of doubt when the specific fraudulent intention was expressly found, and the taking the house was only a part of the machinery of the fraud: and, with respect to Sir E. H. East's suggestion, that the difficulty may have\* arisen from mistaking matters of fact for matters of law, he further observes, that this seems to be the true view of the case; for, if the use of the assumed name is intended to commit a fraud in the particular instance, there is no reason for not treating it as a forgery, although that may only be part of a more general system of fraud, which such assumption is intended to carry into effect. (h)

Whiley's case. Conviction of forgery bolden to be right where the name made use of by the prisoner in the forged instrument was assumed by him with the intention of defrauding the prosecutor.

In a more modern case where the indictment charged the prisoner, Samuel Whiley, with forging a bill of exchange for 60*l.* dated Bath, Jan. 5th, 1805, drawn in the name of Saml. *Milward*, payable to his own order to Messrs. Stephenson & Co., bankers, in London, with intention to defraud H. Thurston; and (in a second count) with uttering such bill knowing it to be forged; the following facts appeared in evidence. The prosecutor was an upholsterer in Bath: and on the 27th Dec., 1804, the prisoner, being at that time a stranger to him, come to his house, and applied to take a coach-house and stable, which the prosecutor let him for three months. The prisoner then hespoke some goods of the prosecutor to the amount of 16*l.* 2*s.* which he directed to be sent to him, writing his direction in the prosecutor's book, "Saml. Milward, No. 12, Kensington-place, Bath." In the course of three days the goods were sent; and the prisoner came shortly afterwards, and ordered more goods; and before all the goods were delivered, he told the prosecutor to get his bill ready by four o'clock, on Old Christmas

e Lee Lewis's case, *ante*, 1426, note (g).  
f 2 East. P. C. c. 19. s. 50. p. 969, 970.  
g 2 East. P. C. c. 19. s. 50. p. 970

h 6 Ev. Col. Stat. Part V. Cl. xii. p. 580.:  
and Hadfield's case is cited. See *ante*, 1425.

even, at which time he would call for it. He called at the time appointed; and the bill, amounting to 49*l.* 10*s.*, was given to him. He said the bill was very right; that it was his rule to discharge all bills on Old Christmas eve; and that he would return again in ten minutes; which he did, bringing with him the bill of exchange in question; and saying that he would give the prosecutor a draft on his banker in London for 60*l.* The prosecutor looked at the bill of exchange, which was indorsed with the name "Saml. Milward;" and, upon the prisoner saying it was a good one, gave him the balance of ten guineas. The prisoner then told the prosecutor that he should want more goods, and should be a very good customer to him. The bill of exchange having been sent to the bankers, in London, was returned to the prosecutor on the 25th Jan. dishonoured, and the prosecutor went immediately to the prisoner's house, in Bath, but he found it shut up, and saw nothing more of the prisoner till about three weeks afterwards, when he was in custody. A clerk from the London bankers, Messrs. Stephenson and Co., proved that they knew no such person as Saml. Milward. And it was satisfactorily proved that the prisoner's real name was Saml. *Whiley*: that he was baptized as the son of persons of that name, was married by that name, had gone by the same name at Bath, when he lodged there for about a week in the July preceding this transaction; and at Bristol in the following October; as also at Bath again on the 4th of December; and further that on the 20th of December (which was about a week before he first came to the prosecutor) he had taken a house in Worcestershire, under the same name. But on the 26th of December (the day after his first application to the prosecutor) he ordered a brass plate to be engraved with the name of "Milward," which was fixed on the door of his house on the following day. The prisoner stated in his defence that he had understood from his father that he was christened by the name of Saml. Milward; and that, being under difficulties, and afraid of arrests, he had omitted the name of Whiley. In answer to questions put by the learned Judge who tried the prisoner, the prosecutor stated that he took the draft on the credit of the prisoner, whom he did not know; that he presumed the prisoner's name was that which he had written, and had no reason to suspect the contrary: but that if the prisoner had come to him under the name of Saml. Whiley he should have given him equal credit for the goods, and have taken the draft from him and paid him the balance as he had done when he came under the name of Milward. The learned Judge left it to the jury to say whether the prisoner had assumed the name of "Milward" in the purchase of the goods, and given the draft, with intention to defraud the prosecutor. And the jury, saying that they were satisfied of

[\*1438]

[\*1439]

that fact, found the prisoner guilty. The case was afterwards submitted to the consideration of the twelve Judges; who were of opinion that the question of fraud being so left to the jury, and found by them, the conviction was right. (i)

Francis's case. If the name used by the prisoner be assumed for the purpose of fraud, and to avoid detection, it will be as much a forgery as if the assumed name were the name of a person of known credit.

In a case which occurred a few years afterwards, the prisoner was indicted for forging an order for the payment of money, in which, by the name of *James Cooke junior*, he requested Messrs. Praed and Co., bankers, in London, to pay Mrs. Ware, or bearer, fifteen pounds. It appeared in evidence that on the 15th August, 1808, the prisoner took lodgings at the house of Mrs. Ware, by the week, and continued there till the 9th of September following, on which day he gave Mrs. Ware the order in question for a bank note of fifteen pounds, which she advanced to him upon his applying to her for change. Mrs. Ware paid the order away to a neighbour, who took it to the bankers; and, upon payment being refused, brought it back to Mrs. Ware, who immediately informed the prisoner of its being returned. The prisoner, first reading over the order, said that he saw he had made a mistake, and had forgotten to put the word "junior," which word he then added, and said that Mrs. Ware would find it would be right. Shortly afterwards the prisoner left the house, saying he should return to tea; but he never did return. The order, with the addition, was presented at Messrs. Praed and Co.'s, the next morning, and payment refused, the drawer not being known at that house, and no person of that name keeping cash there. It was satisfactorily proved that the prisoner's real name was John Francis, though he had occasionally gone by other assumed names. The case was left by the learned Judge to the jury,

[\*1440] \*with a direction that they should consider whether the prisoner had assumed the name of *James Cooke, junior*, with a fraudulent purpose; and they found a verdict of guilty: but upon some doubts occurring whether the facts in evidence went to establish a forgery, or only a fraud, the case was referred to the consideration of the twelve Judges. Mansfield, C. J., the Chief Baron, Grose, J., and Lawrence, J., were absent when the case was debated; but the Judges who were present, held the conviction right: and were of opinion that if the name were assumed for the purpose of the fraud, and avoiding detection, it was as much a forgery as if the name assumed were that of any other person of known credit; though the case would be different if the party had habitually used and become known by another name than his own. (k)

i Whiley's case, cor. Thomson, B., Somersetshire, Spr. Ass. 1805; and considered of by the Judges in June, 1805, MS.

k Francis's case, Old Bailey, 1811, MS. The prisoner was recommended to mercy on the condition of being transported for life.

Having thus treated of the name in which a forgery may be committed, we may proceed to consider how far the *validity* in law of the thing forged, supposing it were true, is essential to forgery. As to the validity of the thing forged, if genuine.

Though it is said to be in no way material, whether a forged instrument be made in such a manner as that, if it were in truth such as it is counterfeited for, it would be of validity or not; (*l*) yet it seems to be material, that the false instrument should carry on the face of it the semblance of that for which it is counterfeited, and should not be illegal in its very frame. (*m*) One of the definitions of forgery is given, as “the false making an instrument, which purports *on the face of it* to be good and valid for the purposes for which it was created, with a design to defraud.” (*n*)

\*Upon the ground that it is not material whether a forged instrument be so made as that, if it were in truth such as it is counterfeited for, it would be of validity or not, it has been adjudged that the forgery of a protection in the name of A. B., as being a member of parliament, who in truth at the time was not a member, is as much an offence at common law, as if he were so. (*o*) [\*1441]

In a case, where the defendant was convicted upon an indictment (on the statute 5 Eliz. c. 14.) which stated that one Garbut and his wife were seised in fee of certain messuages, lands, and tenements, called Jawick, in the parish of Clacton in Essex, and that the defendant intending to molest them, and their interest in the premises, forged a lease and release as from Garbut and his wife, whereby they were supposed for a valuable consideration to convey to him “all that park called Jawick, in the parish of Clacton in Essex, containing eight acres in circumference, with all the deer, wood, &c. thereto belonging,” it was moved in arrest of judgment, that the premises supposed to be conveyed were so materially different from those which were really the estate of Garbut and his wife, that it was impossible this conveyance could ever molest or disturb them. But the court held that it was not necessary, there should be charge, or a possibility of a charge, and that it was sufficient if it were done with such intent, and that the jury had found that it was done with intent to molest Garbut and his wife in the possession of their land. (*p*)

So where an indictment was for forgery at common law of a surrender of the lands of J. S., and it was not shewn in the indictment that J. S. had any lands, it was holden upon

*l* 1 Hawk. P. C. c. 70. s. 7. 2 East. P. C. c. 19. s. 43. p. 943.

*m* 2 East. P. C. c. 19. s. 43. p. 948.

*n* By Eyre, B. in Jones and Palmer's case. 2 Str. 901. 2 East. P. C. c. 19. s. 33. p. 921.

*o* Leach 367.

*p* Deakin's case, 1 Sid. 112. 1 Hawk. P.



[\*1442] motion in arrest of judgment that the indictment was good, \*upon the principle that it was not necessary to show that the party was prejudiced. (q)

Forgery may be committed by the false making of the will of a living person; though a will is ambulatory during the life of a party, and can have no validity as a will until his death.

Upon the same principle, the doctrine is established by several cases, that forgery may be committed by the false making of an instrument, purporting to be the will of a person who is still living; notwithstanding the objection, that during the life of a party his will is ambulatory, and can have no validity as a will until his death. Thus, a prisoner was convicted for forging a seaman's will, who it appeared was still alive, and had returned to England two years after the prize money had been received by the prisoner, under a forged will. (r) In a subsequent case, where the prisoner was indicted for forging the last will and testament of a woman who was still living, and was a witness on the trial, and convicted, the judgment was respited upon a doubt, whether as the supposed testatrix was living, the prisoner was legally convicted of having forged her *last will* and testament; there being no such instrument as a last will and testament in contemplation of law, until after the death of the person making it: but the Judges are said to have been unanimously of opinion, that an instrument may be the subject of forgery, although in fact it should appear impossible for such an instrument as the instrument forged to exist, provided the instrument purports on the face of it to be good and valid, as to the purposes for which it was intended to be made. (s) The point was again referred to the consideration of the Judges, in a case where the prisoner was indicted and convicted for knowingly uttering and publishing

[\*1443] \*as true, a certain false and forged will and testament of one J. G., late a seaman belonging to a merchant vessel, &c. and it appeared, that the said J. G. was living. All the Judges held that the conviction was right. It was observed by the learned Judge who delivered their opinion, that every will must be made in the lifetime of the party, whose will it was; that it existed as a will in his lifetime, though not to take effect till his death; and that the making a false instrument importing on the face of it to be a will, was equally forgery, whether the person whose will it purported to be were dead or alive, at the time of making it. That a contrary doctrine would operate as a repeal of the law; for if the act of making the will were not forgery at the time, a publication afterwards would not make it so. Buller, J.—thought the very definition of forgery decided the doubt, for

q Goate's case, 1 Lord Raym. 737. But it seems clearly to be necessary, that there should be a possibility of prejudice to the party. See the definitions *ante*, 1411, and Ward's case. 2 East. P. C. c. 19. s. 7. p. 862.

r Murnhy's case, O. B. 1753 10 St. Tri.

183. (Hargr. ed.) 2 East. P. C. c. 19. s. 43 = p. 949.

s Sterling's case, O. B. 1773. 1 Leach 99, where it is said, that the case was decided upon the authority of Anne Lewis's case. Post. 116. *Ante*, 1426.

it was the making a false instrument with intent to deceive; and that here the intention to deceive had been established by the jury, and the instrument purporting to be a will was clearly false. (t)

Upon the same principle also, of its not being necessary, that the instrument charged to be forged, should be such as would be effectual if it were a true and genuine instrument, it has been holden, that forgery may be committed of an instrument on *unstamped* paper.

Forger may be committed of an instrument, &c.

The prisoner Hawkeswood, being indicted for forging a bill of exchange, an objection was taken on his behalf, that the bill in question was not stamped pursuant to the statutes 22 Geo. III. c. 33., 23 Geo. III. c. 49. s. 14., and 23 Geo. III. c. 58. s. 11.; (u) and that it was not, therefore, \*a lawful bill of exchange but a piece of waste paper incapable of becoming the subject of either fraud or felony; that the party who took it must at the time have known that it was not a legal bill of exchange, or he must have been grossly negligent, the defect being visible on the face of it. But Buller, J. who tried the prisoner, over-ruled the objection, on the ground that the stamp acts were merely revenue laws, and did not purport in any way to alter the crime of forgery; and that the false instrument had the semblance of a bill of exchange, and was negotiated by the prisoner as such. But he saved the point for the consideration of the twelve Judges, who were all of opinion, that the prisoner was properly convicted; that the stamp acts, in saying that a bill without a stamp shall not be pleaded, or given in evidence, or be available, in law or equity, signified only that it should not be made use of to recover the debt; and further, that the holder might get the bill stamped after it was made. (v)

Hawkeswood's case. Forgery of a bill of exchange on un-  
[\*1444]  
stamped paper.

This authority was acted upon in a case which occurred very shortly afterwards, where the prisoner being indicted for forging a bill of exchange, an objection which was taken to the bill being produced in evidence because it was not stamped was overruled, and the prisoner was convicted and executed. (x)

The point underwent further discussion in a case which occurred after the statute 31 Geo. III. c. 25. s. 19. had prohibited the stamping of a bill or note after the time of their

Morton's case. Holden that forge-

t Coogan's case, O. B. 1787, and Mich. T. 1787. 1 Leach 449. 2 East. P. C. c. 19. s. 43. p. 949. The indictment appears to have been framed on the statute 2 Geo. II. c. 25. and not on the statute 31 Geo. II. c. 10. s. 2. which is confined to seamen on board the king's ships. The last statute has the words "last will," the other the word "will" only.

fect that no bill of exchange &c. not stamped as these acts direct, shall be pleaded, or given in evidence in *any* court, or admitted in *any* court to be good or available in law or equity.

v Hawkeswood's case, *Worcester Spring Ass.* and East. T. 1783. 1 Leach, 257. 2 East. P. C. c. 19. s. 45. p. 955.

x Lee's case O. B. 1784. 1 Leach 258 note (a)

\* The provisions of the acts are to the effect

ry might  
be com-  
mitted of  
a promis-  
[\*1445]  
sory note  
on un-  
stamped  
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statute 31  
Geo. III.  
c. 25. s. 19.  
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hibited the  
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terwards.

being made. The prisoner, Morton, was indicted for knowingly uttering a forged promissory note, which, on being produced in evidence, appeared to have been drawn on unstamped \*paper; and the case was saved for the opinion of the Judges, as well on the principal point, as on the statute 31 Geo. III. c. 25. s. 19. which passed after Hawkeswood's case, and prohibited the stamp to be afterwards affixed. The question underwent much consideration, and was debated by the Judges in the course of several terms. Two or three of the judges doubted at first the propriety of Hawkeswood's case, if the matter were *res integra*, yet they all agreed that they must be governed by that case, as it was an authority in point; and that the statute 31 Geo. III. c. 25. s. 19. made no difference in the question. And most of the Judges maintained the principle in Hawkeswood's case to be well founded; for they held that the acts of parliament which had been referred to and relied on, being mere revenue laws, meant to make no alteration in the crime of forgery, but only to provide that the instrument should not be available for the purpose of recovering on it in a court of justice; but it might be received in evidence for collateral purposes; and they instanced the 6th and 10th sections of the act which made the party, drawing such a bill, liable to the statute duties, and to a penalty of 20*l.*; in both which cases the bill must be used in evidence. And they considered that in order to constitute forgery it was not necessary that the instrument should be available; that though a compulsory payment, by course of law, could not have been enforced for want of the proper stamp, yet a man might equally be defrauded by a voluntary payment being lost to him; that if this were a sufficient defence, forged securities might be published on improper stamps with impunity. which would carry the mischief to an alarming extent; that the stamp itself might be forged; and it would be a strange defence to admit in a court of justice, that because a man had forged the stamp, he ought to be excused for having forged the note itself, which would be setting up one fraud in order to protect him from the punishment due to another. (*y*)

[\*1446] \*So where it appeared that the forgery, charged against the prisoner, was the alteration of a 10*l.* bill of exchange into one for 50*l.* it was holden to be not less a forgery from the circumstance of the bill having been reissued three times as a 10*l.* bill without being restamped, and being, therefore, not available in a civil action at the time the alteration in it of 10*l.* into 50*l.* was effected. The Judges, on a conference, said that it had been decided that the stamp

*y* Morton's case, York Sum. Ass. 1795. 2 Fost. P. C. c. 19. s. 45. p. 955.  
Mich. T. 1795. and Hil. and East. T. 1796.

acts had no relation to the question of forgery; and that supposing the instrument forged to be such on the face of it as would be valid, provided it had a proper stamp, the offence was complete. (z)

The same doctrine was acted upon in several other cases. (a) And it is well observed that if the matter be duly considered, the words of the stamp acts before mentioned can only be applicable to a true instrument; for a forged instrument, when discovered to be such, never can be made available, though stamped; and that the acts, therefore, can only be understood as requiring stamps on such instruments as were available without a stamp before those acts passed, and which would be available afterwards with a stamp. (b)

The same doctrine acted upon in other cases.

It has been spoken of as a material circumstance that the false instrument should carry on the face of it the semblance of that for which it is counterfeited. (c) But it is not necessary that the resemblance to the known instrument should be exact: it seems to be sufficient if the instruments be so far alike that persons in general using their ordinary observation upon the subject may be imposed upon by the deception, \*though it would not impose upon persons having particular experience in such matters. (d)

The false instrument should carry on the face of it the semblance of that for which it is [\*1447] counterfeited; so as to deceive persons using ordinary observation.

Thus where the prisoner was indicted for the forgery of bank notes, and a witness for the prosecution, who came from the Bank of England, stated that he could not have been imposed upon by the forged notes, the difference between them and the true notes being to him very apparent in several particulars, but it appeared that others had been deceived at first by them, though they were very ill executed, Le Blanc, J., proceeded upon the foregoing principles. (e)

The doctrine had previously been sanctioned by the opinion of the Judges in the following case. The prisoner, James Elliot, was indicted for forging a bank note of the following tenor.

Elliot's case. A conviction is good for forging a bank note, though in such forged note the word "pounds" be omitted, and though there be no water-mark

No. 1773.

I promise to pay to Mr. Jos. Crook or bearer, on demand, the sum of Fifty

London, 20 June, 1775.

£ Fifty.

For the Govr. and Company of the Bank of England.

Entd. C. BLEWERT.

THOS. THOMPSON.

z Teague's case, cor. Le Blanc, J., *Hereford Sum. Ass.* 1802, and *Mich. T.* 1802.

2 East. P. C. c. 19. s. 55. p. 979.

(a) Reculist's case, O. B. 1796. 2 Leach, 703. Davies's case, cor. Grose, J., *Surry Spr. Ass.* 1796. 2 Leach, 707. note (b).

2 East. P. C. c. 19. s. 45. p. 956.

b 2 East. P. C. c. 19. s. 45. p. 956.

c *Ante* 1440.

d 2 East. P. C. c. 19. s. 6. p. 858. and s. 44. p. 950.

e Hoost's case, cor. Le Blanc, J., *Exeter Sp. Ass.* 1802. 2 East. P. C. c. 19. s. 44. p. 950.

in the pa-  
per.

[\*1448]

[\*1419]

Some of the counts of the indictment stated the instrument to be a bank note, and others to be a note in the form of a bank note; but the fifth count, which was that on which the question turned, and on which the counsel for the crown relied, charged “that the said James Elliot, on the 14th June, 1777, feloniously did make, forge, and counterfeit, and cause and procure to be falsely made, forged and counterfeited, &c. a certain promissory note for the payment \*of money, with the name of *Thomas Thompson*, thereunto subscribed, purporting to bear date, &c., and to have been signed by one *Thomas Thompson*, for the Governor and Company of the Bank of England, for the payment of fifty pounds to Mr. Joseph Crook or bearer, on demand, the tenor of which, &c., with intention to defraud the Governor and Company of the *Bank of England*.” It appeared that the note had never been published, being found in the prisoner’s possession at the time he was apprehended; but the forgery was brought home to him, and he was convicted. The doubt concerning his case arose upon the following facts, which appeared in evidence. The officers of the Bank of England proved that the note was in every respect, both in paper and print, similar to a bank note, both in the written and printed parts of it, except, first, that the number was not filled up; secondly, that the word “pounds” was omitted in the body of the note; thirdly, that the texture of the paper was rather thicker than that used by the bank; and, fourthly, that, in the fabric of it, the water mark, viz. the words “Bank of England,” were not inserted: but they said that a bank-note, with the like omission of the word “pounds” in the body of it, being regular in other respects, would be paid, by the usage of the bank, after it had passed the examiner’s office. And a real bank-note of the same date and tenor, except as above excepted, was produced in evidence. Upon these facts it was contended that this was not a note resembling a bank-note for want of the *water mark*; and also that it was not a note for *fifty pounds*, the word “pounds” being omitted: and judgment was respited in order to take the opinion of the twelve Judges. The case was considered by them, and they were all (except De Grey, C. J., and Smythe, C. B., who were absent,) of opinion that the conviction was right; as in forgery there need not be an exact resemblance; and it is sufficient if the instrument is *primâ facie* fitted to pass for a true instrument. The majority of the Judges inclined to think that the omission of the word “pounds” in the body of the note, had nothing else appeared, would not \*have exculpated the prisoner; and that it was matter to be left to the jury, as it was done, whether it purported to be a note for *fifty pounds*, or any other sum: and all the Judges agreed that the “fifty” in the margin of it re-

moved every doubt, and shewed that the fifty in the body of the note was intended for fifty pounds. (*f*)

Upon the same principles, in a case where the prisoner engraved a counterfeit medicine stamp, so as to be like to a genuine stamp, except only that the centre part, which in a genuine stamp specifies and denotes the duty, was blank in the first instance, but cut out before the counterfeit stamp was used, a paper with the words "Jones Bristol" on it being pasted over the vacancy, and then uttered such counterfeit stamp, it was holden that he was guilty of a forgery and uttering. Grose, J., in delivering the opinion of the twelve Judges on this case, after stating that it was proved that those parts of the counterfeit stamp which remained were a perfect resemblance of the same parts on a genuine stamp, and that the whole was a fabrication so artfully contrived as to be likely to deceive the eye of every common observer, further said, "an exact resemblance or *fac-simile* is not required to constitute the crime of forgery; for if there be a sufficient resemblance to shew that a false making was intended, and that the false stamp is so made as to have an aptitude to deceive, that is sufficient." (*g*) It has been determined on the statute 25 Edw. III., that splitting the great seal, and closing it again to a false patent, is a counterfeiting of the seal: (*h*) and that where the seal is substantially counterfeited, the adding or omitting of a crown, the leaving out words in the style, or adding others, or making any other minute variation in the counterfeit, which is \*often done purposely, [\*1450] and by way of eluding the law, will not alter the case. (*i*)

Collicott's case. Engraving a counterfeit stamp like in some part to a genuine stamp, and unlike in others, and then cutting out the unlike parts, and concealing the part cut out, and then uttering it is a forgery, and guilty uttering.

And it seems that a mere literal mistake in the framing of the instrument itself, well laid in the indictment, will not make any difference. And it is observed that in a case where the prisoner, in forging an order for the delivery of goods, blundered in spelling the name, using *Desemockex* for *Desormeaux*, no stress was laid on such circumstances, though on other grounds the indictment was holden bad. (*k*)

A mere literal mistake will not make any difference.

The prisoners, Dominick Fitzgerald and James Lee, were indicted for forging the last will and testament of Peter Perry, late a seaman on board his majesty's ship the *Lancaster*, with intent to defraud the king. The will began—"In the name of God, Amen, I, *Peter Perry*, &c., and

Fitzgerald and Lee's case. Forgery may be committed of a will,

*f* Elliot's case, *Maidstone* Sum. Ass. 1777. Mich. T. 18 Geo. III. 1 Leach. 175. 2 East. P. C. c. 19. s. 44. p. 951. 2 New. R. 93. note (*a*).

*g* Collicott's case, 1812. 2 Leach. 1048. 4 Taunt. 300.

*h* 1 Hale 178, 184.

*i* Robinson's case, 2 Roll. R. 50. 1 East. P. C. c. 2. s. 25. p. 86. This was an indictment under the statute 1 Mary. c. 6. for coun-

terfeiting the privy signet. In 1 East. *ub. supr.* it is said; "The disparity, however, may be so great between the true and false seal that it would not amount to a counterfeiting within the statute, as if it be evident to the view of every man's eye."

*k* 2 East. P. C. c. 19. s. 45. p. 952, 953. The case referred to is Clinch's case, 1 Leach 540. 2 East. P. C. c. 19. s. 37. p. 938.



though it  
be signed in  
the wrong  
*Christian*  
name of the  
person  
whose will  
it purports  
to be.

his  
ended *John X Perry.*" Upon the evidence it appeared that  
mark.

[\*1451]

the prisoner, Fitzgerald, carried the will to the office of the deputy register, who, on observing the difference of the *Christian* names, told him that he must produce the person who had written the will, or the person who was present when it was executed, in order to account for this error, before the probate could be granted. Fitzgerald accordingly produced the other prisoner, Lee, who, in the name of *Welsh*, swore that he was one of the subscribing witnesses; that the name of the deceased was *Peter Perry*; that the said *Peter Perry* did make his mark to, and deliver the said \*will; and that he (*Welsh*) by mistake had written the name *John Perry* instead of *Peter Perry*. Upon this, a probate of the will was granted. The prisoner having been found guilty, the question was reserved for the consideration of the Judges, whether this was in law a forging of the will of *Peter Perry*, as laid in the indictment? And though no opinion was ever publicly delivered, the prisoners were afterwards executed pursuant to their sentence. (m)

Wicks's  
case. Forged  
bill of  
exchange,  
though no  
indorse-  
ment of the  
names of  
the draw-  
ers.

In a case where it was proved that the prisoner took a bill of exchange, which he was indicted for forging and uttering, knowing, &c. to a banker's, in order to get it discounted, and, upon receiving the discount, indorsed it there, but not in his own name; and it appeared also, that though there was the indorsement of another name upon the bill besides that which the prisoner indorsed, yet there was no indorsement upon it of the names or firm of the drawers who were also the payees: it was objected on behalf of the prisoner that, as there was nothing upon the bill purporting to be an indorsement of the drawers, it could not pass as a bill of exchange, nor was capable of defrauding the persons whose names were forged. (n) But the learned Judge who tried the prisoner over-ruled the objection, and the prisoner was convicted: and, upon the point being afterwards submitted to the consideration of the twelve Judges, they were of opinion that the conviction was right. (o)

It may be  
forgery  
though the  
instrument  
is not avail-  
able by

[\*1452]  
reason of  
some colla-

It is also laid down as clear, that it is no objection to the charge of forgery that the instrument is not available, by reason of some collateral objection not appearing upon the face of it. (p) So that, where a prisoner was indicted for forging an order for the payment of prize-money, and it appeared \*that the party whose name was forged was a discharged seaman, and was at the time the order bore date within seven miles of the port where his wages were payable: un-

m Fitzgerald and Lee (case of) O. B. 1741. and Mich. T. 15 G. II. 1 Leach 20. 2 East. P. C. c. 19. s. 45. p. 953.

n Amongst other cases Moffat's case, post

1453, and Wall's case, post 1454, were cited. o Wicks's case cor. Wood, B. Glouc. &c. Spr. Ass., 1309, MS.

p 2 East. P. C. c. 19. s. 45. p. 953

der which circumstances his genuine order would not have been valid by the provisions of the 32 Geo. III. c. 34. s. 2., unless made in the manner therein prescribed: the offence was holden to be forgery, the order itself purporting, on the face of it, to be made at another place beyond the limited distance. (*q.*)

But the offence will not be forgery where the false instrument does not carry on the face of it the resemblance of that for which it is counterfeited, or where it is illegal in its very frame. (*r.*)

In a case where the instrument charged to be forged was an order in the name of a creditor to a gaoler, for the discharge of a debtor who was in prison under an attachment for a contempt, it was objected that such instrument was a mere nullity in itself, even if genuine; but it became unnecessary to decide upon the objection. (*s.*)

Where the false instrument was in the following form, without any signature—

No. F. 946.

I promise pay to John Wilson, Esq., or bearer, Ten Pounds.

London, March 4, 1776.

£ Ten.

For Self and Company, of my  
Bank in England.

Entered, JOHN JONES.

\*and it was laid in one set of counts as a paper writing, purporting to be a bank note; and in another as purporting to be a promissory note, for the payment of money; it was holden that the prisoner was entitled to an acquittal, though it was specially found by the jury that the prisoner averred that the instrument was a good bank note, and uttered and published it as a good bank note. The court said, that the representation of the prisoner could not alter the purport of the instrument, which was what appeared upon the face of the instrument itself; and that, although such false representations might make the party guilty of a fraud or cheat, they could not make him guilty of a felony. (*t.*)

In a case where a bill of exchange was directed to “John Ring,” and the acceptance was by “John King;” and the indictment stated that the bill purported to be directed to

*q* M’Intosh’s case, *cor.* Le Blanc, J., O. B. 1800, and afterwards considered by the Judges, 2 East. P. C. c. 19. s. 39. p. 942. 2 Leach, 883. *r* *Ante*, 1440.

*s* Fawcett’s case, York Spr. Ass. 1793, 2 East. P. C. c. 19. s. 7. p. 862., and s. 45. p. 952., where the learned writer says, that it does not appear whether the Judges decided the case on that ground; as, at any rate, the indictment was holden good as a cheat. And

see Gibbs’s case, 1 East. R. 173. 2 East. P. C. c. 19. s. 7. p. 864.

*t* Jones’s case, *cor.* Lord Mansfield, Chelmsford Sum. Ass. 1779, and B. R. Mich. T. 30 Geo. III. Doug. 302. 1 Leach, 204. 2 East. P. C. c. 19. s. 11. p. 883., and s. 45. p. 952. Upon this case Mansfield, C. J., in the case of Rex v. Callicot, 4 Taunt. 303., observed, “Jones’s crime was that of telling a falsehood.”

teral objection.

But it will not be forgery where the false instrument has no resemblance of the true one, or is illegal in its very frame.

Jones’s case. Instrument defective as a bank note.

[\*1453]

John King by the name of John Ring, and that the prisoner forged the acceptance in the name of John King; judgment was arrested, because Ring could not purport to be King. (u)

Moffatt's case. A bill of exchange drawn for less than the sum, and not in the form required by the statute 17 Geo.

[\*1454] III. c. 30., holden not to be the subject of a capital forgery.

Where the indictment was for knowingly uttering, as true, a forged acceptance of a bill of exchange; and it appeared that the bill in question was absolutely void by the provisions of a statute at that time in force, it was holden that a conviction could not be supported. The bill of exchange was of the following tenor—

SIR,

Navy Office, 21st December, 1786.

Seven days after date, please to pay to Mr. John Moffatt. \*or his order, the sum of Three Pounds Three Shillings, and place the same to the account of

WALTER STERLING.

To George Peters, Esq.

Bank of England.

Accepted, G. Peters.

And the question was, whether, supposing this bill of exchange to be void, by the provisions of the statute 17 Geo. III. c. 30. s. 1., (x) not being drawn according to the form therein prescribed, (as it neither specified *the place of abode of the payee*, nor was attested by any subscribing witness, though for less than 5*l.*,) the forging of it could be considered as a capital offence within the statutes 2 Geo. II. c. 25. and 7 Geo. 2. c. 22., on which the indictment proceeded. All the Judges were of opinion that the conviction was wrong; on the ground that, if the bill in question had been a genuine instrument, it would have been absolutely void, and nothing could have made it good: and that, by the statute 17 Geo. III. c. 30. such an instrument was no bill, and had not the appearance or semblance of one. (y)

Wall's case. A conviction for forging a will of land, attested by only two witnesses, holden to be wrong.

[\*1455]

The prisoner, Thomas Wall, was convicted upon an indictment for forging and knowingly uttering a will of land of one John Skidmore, deceased, attested by only two witnesses; and, as it did not appear in evidence what estate the supposed testator had in the land so devised, or of what nature it was, so that it might be presumed to be freehold, and, therefore, the will void and of none effect, by the express enactment of the statute of frauds, (z) for want of the \*attestation of three witnesses, the Judges held the convic-

u Reading's case, O. B. 1793, and 1794., 2 Leach, 590. 2 East. P. C. c. 19. s. 45. p. 952., and s. 56. p. 931.

x This statute continued in force till the end of the session of parliament, during which the forgery was committed. It was afterwards made perpetual by 27 Geo. III. c. 16. but suspended by the 37 Geo. III. c. 32. and

other statutes, until six months after the ratification of a treaty of peace. See 1 Leach, 434, note (a).

y Moffatt's case, O. B., 1787, and Hil. T. 1787. 1 Leach, 431. 2 East. P. C. c. 19. s. 45. p. 954.

z 29 Car. II. c. 3. s. 5.

tion wrong; on the ground that, as it was not shewn to be a chattel interest, it was to be presumed to be freehold. (a)

## SECTION II.

### OF THE WRITTEN INSTRUMENTS IN RESPECT OF WHICH FORGERY MAY BE COMMITTED.

WE may now proceed to consider of the written instruments in respect of which forgery may be committed.

It is clearly agreed that, at common law, the counterfeiting of a matter of record is forgery; for, since the law gives the highest credit to all records, it cannot but be of the utmost ill consequence to the public to have them either forged or falsified. (b) Also, it is agreed to be forgery to counterfeit any authentic matter of a public nature; as a privy seal, (c) or a licence from the barons of the exchequer to compound a debt, (d) or a certificate of holy orders, (e) or a protection from a parliament man. (f) It is also unquestionable that a man may be, in like manner, guilty of forgery at common law, by forging a deed; (g) and, therefore, it seems that one may be equally guilty by forging a will, which cannot be thought to be of less consequence than a deed. (h) There seem to be some strong opinions in the books that the counterfeiting of any writings of an inferior nature to those above-mentioned is not \*forgery at the common law. (i) And it has also been holden, that the forging of another's hand, and thereby receiving rent due to him from his tenants, is not punishable at all. (k) But Hawkins remarks, that it cannot surely be proved by any good authorities, that such base crimes are wholly disregarded by the common law, as not deserving a public prosecution; and that the opinion of their being punishable by no law seems not to be maintainable, since many of them are most certainly punishable by force of the 33 Hen. VIII. c. 1.; and that it cannot be a convincing argument that they are not punishable by common law, because they are of a private nature, as much as other writings concerning other matters; no one being ready to affirm that the making of a false deed concerning a private matter is not punishable at common law. He further says that, perhaps it may be rea-

Of the written instruments in respect of which forgery may be committed.

[\*1456]

a Wall's case, cor. Thomson, B., *Worcester Sp. Ass.*, 1800; and *East. T.* 1800. 2 *East*, P. C. c. 19. s. 45. p. 953, 954.

b 1 *Roll. Ab.* 65, 76. *Yelv.* 146. *Cro. Eliz.* 178. 8 *Mod.* 66.

c 1 *Roll. Ab.* 68. pl. 33. *Cro. Car.* 326. 1 *Jones* 325.

d 1 *Roll. Ab.* 65. pl. 5. 2 *Buls.* 137.

e 1 *Lev.* 138.

f 1 *Sid.* 142.

g 1 *Roll. Ab.* 66. *Raym.* 81. *Ow.* 47. 1 *Sid.* 278. 3 *Leon.* 170.

h *Moor*, 760. *Noy*, 101. *Dy.* 302. 1 *Hawk.* P. C. c. 70. s. 10.

i 1 *Roll.* 431. 1 *Sid.* 16. 155. 451. 1 *Roll. Ab.* 66. *Winch*, 40. 90. 1 *Leon.* 101. 3 *Leon.* 231. *Cro. Eliz.* 296. 853. 3 *Buh.* 265.

k *Cro. Eliz.* 166. *Yelv.* 146. 3 *Buls.* 265.

sonable to make this distinction between the counterfeiting of such writings, the forgery whereof, as in the above cases, is properly punishable as forgery, and the counterfeiting of other writings of an inferior nature: that the former is in itself criminal, whether any third person be actually injured thereby or not; but that the latter is no crime, unless some one receive a prejudice from it. (*l*)

It is observed as no matter of surprize to find so able a writer as Hawkins treading with so much caution in a path, now indeed too well beaten; but which, previous to the time of the revolution, when paper securities became much more common, had been but little explored. (*m*) But with respect to the foregoing distinction which he takes, between the counterfeiting of such writings the forgery whereof is properly punishable as forgery, and the counterfeiting of other writings of an inferior nature, it is said that, however plausible this may be, it is by no means a solution of the difficulty, [\*1467] \*but a mere conjecture, which leaves the crime of forgery as † indistinct in principle as before, and tends to confound it with the general class of cheats: (*p*) and that it does not appear upon full consideration of the books to which he refers, that it is any where adjudged, or is even generally laid down, that the counterfeiting of writings of any sort, whereby any person may receive a prejudice, if done *lucri causâ* or *malo animo*, is not punishable as forgery. (*q*) It is also observed, that those books which seem at first sight most strongly to warrant the notion that writings of an inferior nature, such as letters, are not the subjects of forgery at common law, if fairly considered and compared, amount to no more than this, that the imputation of counterfeiting letters or writings *frivolous or of no moment, or from whence no damage could ensue, or of uncertain signification*, is not actionable; and that such letters or writings are incapable from their substance, not from their form, of supporting a charge of forgery, the chief ingredients of which offence are fraud and intention to deceive. (*r*)

Rule now settled that the counterfeiting of any writing with a fraudulent intent whereby another may be prejudiced

The points to which this discussion relates were fully considered in the following important case, in which it was holden that the counterfeiting of a release, or acquittance for a sum of money, though without seal, was forgery; and that it would be a most injurious notion, and even a reflection on the common law, to suppose it so defective as not to provide a remedy against offences of this nature. (*s*) And this case is considered as having now settled the rule, that *the counterfeiting of any writing with a fraudulent intent*,

*l* 1 Hawk. P. C. c. 70. s. 11.

*m* 2 East. P. C. c. 19. s. 7. p. 359.

*p* 2 East. P. C. c. 19. s. 7. p. 359. And as to the distinction between forgery and cheats.

see *ante*, 1370, note (*r*).

*q* 2 East. P. C. c. 19. s. 7. p. 360.

*r* *Id. Ibid.*

*s* 3 Bac. Ab. *Forg.* (B).

† [An error is here made in the paging of the English copy. This has not been altered on want of the Index.]

*whereby another may be prejudiced, is forgery at common law. (t)*

The Attorney-General, by order of the House of Lords, \*filed an information against the defendant John Ward, which charged that he being bound to deliver 315 tons and a quarter of alum, of the value of £1000. to the duke of Buckingham, at a certain day then past, wickedly contriving and intending the said Duke of the said alum to deceive and defraud, and with a wicked and fraudulent intent to avoid the delivery of the said alum, on, &c. at, &c. with force and arms, upon the back of a certain certificate in writing, signed by one A. N., falsely forged and counterfeited, and caused to be forged and counterfeited, a certain writing in the words and figures following:—

“ Schedule { Tons C.  
                  { 660 5  
                  { 315 5  
                  { — —  
                  { 976 10

Mr. John Ward. I do hereby order you to charge the quantity of 660 tons and 1 quarter of alum, to my account, part of the quantity here mentioned in this certificate;

and out of the money arising by the sale of the alum in your hands pay to Mr. W. Ward and yourself £10. for every ton according to agreement; and for your so doing this shall be your discharge.—Buckingham.—April 30th, 1706;” to the evil example, &c. to the great damage of the said duke, and against the peace, &c. And it charged in a second count, that he published the same forged writing, knowing it to be forged, &c. The defendant having been convicted, it was moved in arrest of judgment, that the instrument set forth was not the subject of forgery at common law, and that the offence, was not, therefore, punishable in this form, but at most punishable only as as a cheat; being merely a thing of a private nature, and in effect nothing more than a letter. And it was argued that if the counterfeiting of a letter had been punishable as a forgery at common law, then the making of the statute 33 Hen. VIII. c. 1. to punish those who got the money or goods of others under colour of false tokens, or counterfeit letters was nugatory. It was also urged, that it no where appeared that the duke of Buckingham had been prejudiced by this; which might have been \*indictable as a cheat, if he had been so prejudiced; though not as for forgery at common law. But all the court held that this was indictable as a forgery at common law. That none of the books confine the offence to the particular kinds mentioned in 3 Inst. 169; and that as forging a writing not sealed came within all the mischief of forging a deed, the maxim applied, *ubi eadem est ratio eadem est lex*. That this was recognised in the preamble of the stat. 5. Eliz. c. 14. which recites that the forging of *writings*, as well as of *deeds*,

is forgery at common law. Ward’s case. [\*1468] Forgery of an order to charge certain goods to account, and to appropriate part of the proceeds to the defendant’s own use, with intent to defraud, &c. No fraud was effected; but it was holden that this was forgery.

[\*1469]

1 2 East. P. C. c. 19. s. 7. p. 861.



was punishable by law before that statute; but that offenders had been encouraged by the too great mildness of the punishments; and that the stat. 33 Hen. VIII. c. 1. did not create new offences, but only enhanced the penalty where the fraud was executed. (*u*)

[\*1470] In the argument upon this case, the following instances of indictments at common law, for forging instruments not under seal, were referred to by the counsel for the crown, and relied upon by the court; an indictment for forging letters of credit to raise money, (*x*) for forging a bill of exchange or a promissory note, (*y*) a bill of lading, (*z*) an acquittance, (*a*) a warrant of attorney, (*b*) a marriage register, (*c*) a protection from a member of parliament, (*d*) with several other cases. (*e*) And the offence of forgery was distinguished \*from cheats at common law and upon the statute 33 Hen. VIII. c. 1. where the party received an actual prejudice, which was considered not to be necessary to constitute forgery, in which it was sufficient if the party might be thereby prejudiced. (*f*)

Fawcett's case. The defendant having been committed to gaol, &c. counterfeited a pretended discharge as from his creditor to the sheriff and gaoler under which he obtained his discharge from gaol; and it was holden to be a misdemeanor at common law; al-

In a subsequent case, Leander Fawcett, who had been committed to the gaol at York, under an attachment, sued out of the Court of King's Bench, for a contempt in a civil suit, was indicted for forging a certain writing, purporting to be signed in the name of A. Dawson, (the party who had prosecuted the writ of attachment against him) and to contain the authority of Dawson to the sheriff for his discharge, in the following form.—“To the high sheriff of the county of York, his deputy, &c. and gaoler.—As to any writ, attachment, or any other process or cause whatsoever, at the suit instance or promotion of me A. Dawson, by reason whereof Leander Fawcett is now detained a prisoner in your custody, you may forthwith discharge and set at liberty him the said Leander Fawcett unless detained at the suit of some other person; and for so doing this shall be your warrant and indemnity. (Dated) 26th Feby. 1793. (Signed) A. Dawson, and witnessed by one R. W.” The defendant having been convicted, several questions were submitted to the consideration of the Judges; and, amongst others, whether the order were a matter of such a public nature, that the counterfeiting of it would be a forgery

*u* Ward's case, Hil. 13 Geo. I. 2 Str. 747. 2 Lord Raym. 1461. 2 East. P. C. 19. s. 7. p. 861.

*x* Savage's case, Str. 12.

*y* Sheldon's case, Hil. 34 Car. II. Rot. 35. Rex v. Ward, (a brother of the present defendant) Mich. 6 Geo. I.

*z* Stocker's case, 5 Mod. 137. 1 Salk. 342. The court held the indictment ill for uncertainty; but not because the offence was not forgery at common law.

*a* Rex v. Ferrers, 1 Sid. 278. and the record is in Trem. Entr. 129.

*b* Farr's case, T. Raym. 81.

*c* Dudley's case, 2 Sid. 71. 3 Leon. 170.

*d* Deakin's case, 1 Sid. 142. *ante*, 141.

*e* See 2 East. P. C. c. 19. s. 7. p. 862, note (*g*) where Rex v. Hales and Kinnersley, 9 St. Tr. 77. *ibid.* 93. Rex v. Gibson. 1 Sess. Cas. 423. and *ibid.* 432. are referred to, as relating to promissory notes, and indorsements; and a reference is made upon the subject in general to 13 Vin. Ab. 460. Trem. P. C. 100. 2 Show. 20. Obrian's case, 7 Mod. 378. 2 Sess. Cas. 366. 2 Str. 1144.

*f* 2 East. P. C. c. 19. s. 7. p. 862.

at common law; and also, whether, as the attachment was not for non-payment of money, the order, if genuine, would not have been a mere nullity, and the sheriff not authorised to discharge the prisoner under it. Lord Kenyon, C. J. and Eyre, C. J. said, that there was an injury to a third person, and that it was an interruption to public justice: but the latter thought it was not a forgery, but a cheat. The matter was adjourned to a subsequent term, when Eyre, C. J. was still \*not satisfied as to the forgery; though he thought the indictment good as for a cheat. But all the Judges concurred in holding that the offence was indictable as for a misdemeanor at common law; and a great majority also thought it was forgery at common law. (g)

though as the attachment was not for the nonpayment of money, the order was in itself a mere nullity, and no [\*1471] warrant to the sheriff for the discharge.

### SECTION III.

#### OF THE FRAUD AND DECEIT TO THE PREJUDICE OF ANOTHER'S RIGHT.

WITH respect to the *fraud and deceit*, to the prejudice of another's right, it should always be kept in mind, that though in cases of forgery, properly so called, it is, as we have seen, (h) immaterial whether any person be actually injured or not, provided he *may be* thereby prejudiced, yet the fraud and intention to deceive constitute the chief ingredients of this offence. Thus Buller, J. speaks of it as the making a false instrument "with intent to deceive;" (i) and Eyre, B. as a false signature made, "with intent to deceive." (k) And it is observed, that in the word "deceive" must doubtless be intended to be included an intent to defraud; (l) and that the offence was accordingly defined by Grose, J. as the false making a note or other instrument "with intent to defraud." (m) Eyre, B. also in another \*case defined the of- [\*1472] fence to be the false making an instrument which purports on the face of it to be good and valid, for the purposes for which it was created "with a design to defraud." (n) And it has been argued, that it is no answer to a charge of forgery to say that there was no special intent to defraud any particular person, because a *general intent to defraud* is sufficient to constitute the crime; for if a person do an act the

Of the fraud and deceit to the prejudice of another's right.

g Fawcett's case, York Spr. Ass. 1793, and East. T. 1793. 2 East. P. C. c. 19. s. 7. p. 362. And see the note (a), in which the learned writer says, that Mr. Justice Buller's MS. only made a quære as to the opinion of Eyre, C. J.; but that it appeared from other MSS. as well as Mr. Justice Buller's, that the Judges all concurred to sustain the conviction on the general ground only before mentioned.

h Ward's case, *ante*, 1470.

i Coogan's case, 1787. 2 East. P. C. c. 19. s. 1. p. 853. and s. 43. p. 948. *Ante*, 1443.

k Taylor's case, 1779. 2 East. P. C. c. 19. s. 1. p. 853. and s. 47. p. 960.

l 2 East. P. C. c. 19. s. 1. p. 853.

m Parkes and Brown (case of), 1797. 2 East. P. C. c. 19. s. 1. p. 853. and s. 49. p. 963. 2 Leach 775.

n Jones and Palmer (case of), 1785. 2 Leach 367.

probable consequence of which is to defraud, it will, in contemplation of law, constitute a fraudulent intent. (o) And it has been holden, that in an indictment for forgery, it is sufficient to aver a general intent to defraud a certain person, which intention may be made out by the facts in evidence at the trial. (p)

Forgery consists in the endeavouring to give an appearance of truth to a mere deceit and falsity.

It is said by Hawkins that the notion of forgery does not seem so much to consist in the counterfeiting of a man's hand and seal, which may often be done innocently; but in the endeavouring to give an appearance of truth to a mere deceit and falsity, and either to impose that upon the world as the solemn act of another, which he is no way privy to, or at least to make a man's own act appear to have been done at a time when it was not done, and by force of such a falsity to give it an operation which in truth and justice it ought not to have. (q)

[\*1473] But as the fraud and intention to deceive, by imposing upon the world that as the act of another which he never consented to, are the chief ingredients which constitute this offence: so it hath been holden, that he who writes a deed in another's name, and seals it in his presence, and by his command, is not guilty of forgery, because the law looks upon this as the other's hand and sealing, being done by his approbation and command. (r) So if a man writes a will for another without any directions from him, and he for whom it is written becomes *non compos* before it is brought to him, it is not forgery: for it is not the bare writing of an instrument in another's name without his privity, but the giving it a false appearance of having been executed by him, which makes a man guilty of forgery. (s) Also he cannot be punished as guilty of forgery who rases the word *libris* out of a bond made to himself, and substitutes *marcis*, because here is no appearance of a fraudulent design to cheat another, and the alteration is prejudicial to none but to him who makes it, whose security for his money is wholly avoided by it; yet this it seems would be forgery if by the circumstances of the case it should in any way appear to have been done with any view of gaining an advantage to the party himself, or of prejudicing a third person: and it is holden, that such an alteration, even without these circumstances, is a misdemeanor; though it do not amount to for-

o By Shepherd *arguend.* in Tatlock v. Harris, 3 T. R. 176. and it is observed in 1 Leach 216, note (a), that this doctrine was seemingly adopted by the court.

p Powell's case, 1 Leach 77. It is observed, however, that in Rex v. Bigg, 3 P. Wms. 419, it was holden not to be an objection to a special verdict that the forgery was not found

to have been committed for the sake of lucre, or to defraud the party. 2 East. P. C. c. 19. s. 3. p. 354.

q 1 Hawk. P. C. c. 70. s. 2.

r 1 Hawk. P. C. c. 70. s. 3. and 3 Bac. Ab. Forg. (A).

s Moor 760. 1 Hawk. P. C. c. 70. s. 5. 3 Bac. Ab. Forg. (A).

gery. (t) So that it is well observed, that at any rate it is very dangerous to tamper in these matters. (u)

## SECTION IV.

### OF PRINCIPALS AND ACCESSORIES.

It has been stated in a former part of this work, that it is laid down generally in the books, that all are *principals* in forgery; and that whatever would make a man accessory \*before the fact in felony, would make him a principal in forgery: but that it is conceived, this must be understood of forgery at common law, and where it is considered only as a misdemeanor. (v) And with respect to a case (w) upon the statute 5 Eliz. c. 14. which would seem to lead to a contrary conclusion, it is elsewhere observed that, from its circumstances, there seems no reason for taking that case out of the general rule, that when a statute makes a new felony, it incidentally and necessarily draws after it all the concomitants of felony, namely, accessories before and after. (x) And this doctrine is confirmed by several cases.

Three prisoners, Samuel Soares, William Atkinson, and John Brighton, were charged by the indictment with feloniously uttering and publishing as true a certain false, forged, and counterfeit bank note for £5. knowing it to be forged, &c. with intent to defraud the governor and company of the Bank of England. And the indictment also contained the other usual counts, for forging, and for disposing of and putting away the note, with the like intent; together with counts stating the intent to be, to defraud the person to whom it was offered in payment. It was proved that the prisoner, Brighton, offered the note in question in payment for a pair of garters at a shop in Gosport, and that the other two prisoners Soares and Atkinson were not with Brighton at the time he so offered the note, but were waiting at Portsmouth till he should return to them, it having been previously concerted between the three prisoners that Brighton should go over the water from Portsmouth to Gosport, for the purpose of passing the note, and when he had passed it, should return to join the other two prisoners at Portsmouth; they all three knowing that it was a forged note and having been concerned together in putting off another note of the same sort, and in sharing the produce among

Of principals and Accessories.

[\*1474]

Soares, Atkinson, and Brighton's case.

Where it appeared that two of the prisoners were privy to the uttering of a forged note by previous concert with the other prisoner who actually uttered it; but that they were not present at the fact of the uttering, it was holden that they were ac-

t 1 Hawk. P. C. c. 70. s. 4. 3 Bac. Ab. Forg. (A)

u 2 East. P. C. c. 19. s. 3. p. 854.

v Ante. 43. 44.

w Bothe's case, Moor 666. Ante, 44, note (d).

x 2 East. P. C. c. 19. s. 52. p. 973, 974 And see ante, 44 et sequ.

cessories before the fact, and were therefore entitled to an acquittal on an indictment charging them as principals.

\*them. Upon this evidence, the counsel for the prisoners Soares and Atkinson objected, on their behalf, that they were not guilty of the charge made against them in this indictment, not having been present at the time the other prisoner uttered the note, nor so near as to be able to aid and assist him; and that they could be charged only as accessories before the fact. The jury found that the forged note was uttered by the prisoner Brighton in concert with the other two prisoners, and found them all three guilty. The prisoner Brighton was left for execution: but judgment was respited as to the other two, whose case was referred to the consideration of the Judges, who had no doubt that they were entitled to an acquittal on this indictment charging them as principals, they not being present at the time of the uttering. The prosecutor was, therefore, required to state on what grounds the contrary was meant to be argued; and no suggestion of the kind being made, the two prisoners were recommended to a pardon. (y)

Constructive presence.

So in a late case at the Old Bailey Graham, B. is reported to have said, "It has frequently been held that what would amount to a constructive presence at common law will not be sufficient upon an indictment under a statute. A case under this statute occurred before me at Derby. Two persons went in concert to utter a forged note; one went into a shop to utter it, whilst the other remained at some little distance in the street; it was objected that the latter was not liable as a principal. I saved the point; and the Judges were of opinion that the utterer only was liable." (z)

[\*1476]

\*In the following case a wife was indicted as a principal in a forgery on the statute 49 Geo. III. c. 123. s. 13. and her husband as an accessory before the fact at common law.

Morris's case. Where a wife, by the incitement of her husband, but in his absence, knowingly uttered a forged order and certificate

The indictment charged the prisoner, Sarah Morris, with forging an order and certificate for receiving prize money, which had become due to one Henry Taylor, a petty officer in the naval service, with intent to defraud the commissioners of Greenwich Hospital; and the prisoner, John Morris, with inciting, counselling, aiding, procuring, &c. the said Sarah Morris to commit the said felony. The second count charged Sarah Morris with having knowingly uttered the order and the certificate by the incitement of John Morris. And there were many other counts in which the offence was charged with some variations. It appeared in evidence that

y Soares, Atkinson, and Brighton, (case of), *Winchester Spr. Ass.* 1802. East T. 1802. 2 East. P. C. c. 19. s. 52. p. 974.

z By Graham, B. in the case of Brady and others, for forging and uttering a check, O. B. June 1813. 1 Stark. Crim. Plead. 80. in the

note. But see upon this subject *ante*, 30 to 38. Qu. whether the case referred to by Graham, B. was not the case of *Rex v. Davis and Hall*, tried not at Derby, but at the Lent Ass. 1806. for the town of Nottingham

Henry Taylor, whose name purported to be subscribed to the order, was, in the year 1811, a petty officer on board his majesty's frigate the *Frederickstein*; and in such capacity became entitled to a share of certain prize money arising from the capture of a rich vessel. In the month of November, 1813, the prisoner, Sarah Morris, who was the wife of the other prisoner, John Morris, and real or pretended daughter of Henry Taylor, applied to a clerk in the cheque office, in Greenwich Hospital for the payment of the prize money due to Henry Taylor; and produced at the same time the order stated in the indictment. She was desired to call again, in about ten days, and went away, leaving the order with the clerk. But in about four or five days she came again, and expressed great anxiety to be immediately paid the money, when she was told that the money had not yet come in; and the order was given back to her with a request that she would not apply again until she was duly informed that the money had been remitted to the office. Almost immediately after this second visit the other prisoner, John Morris, wrote a letter to the clerk of the cheque on the subject. On the 8th December, notice was given to Sarah Morris that the prize money was come in, and that she might receive the share of it to which Henry Taylor was entitled; upon which she went to the office with the same order and certificate, which she produced; and had nearly obtained the warrant for the payment of the money, when circumstances occurred which caused suspicion, and she and her husband were shortly afterwards apprehended. It was also proved that Henry Taylor, whose name purported to be signed to the order, could not write, and was obliged always to make a mark whenever his signature was required; and that the name of the officer, by whom the certificate purported to be subscribed, was not his hand-writing. The landlord of the house in which the prisoners lodged stated that the prisoner, John Morris, had, in two or three instances, ordered his wife, Sarah Morris, to go to Greenwich Hospital respecting about 30*l.* of prize money, due to Henry Taylor, his wife's father; that he was constantly talking of having been Henry Taylor's shipmate; that, at one time, Sarah Morris told her husband that she had been to Greenwich; that the prize money was not then ready; that the office had not yet received it; and that he, the witness, had lent the prisoner, John Morris money, upon a belief that he had prize money to receive. He also swore that he really believed that Sarah Morris went to receive it in obedience to her husband's orders. And, as to this fact, it was proved that the prisoner, John Morris, had signed a paper stating that his wife had acted in this business entirely under his orders and directions. It was also proved by a witness who had formerly been a captain's clerk in the navy, that in the

for the receiving of prize money, it was holden that they might be indicted together; the wife as a principal on the statute 49 Geo. III. c. 123.; and the husband as an accessory before the fact at common law.

[\*1477]



month of November, 1813, the prisoner, John Morris, represented to him that there was about 30*l.* prize money due to his father-in-law, Henry Taylor, as a caulker in the Frederickstein frigate; that he did not like to go to a Jew upon the subject; and that he would be obliged to him if he would fill up the blanks in certain papers which he produced; that the witness accordingly filled up the blanks, excepting the signatures; and that, on observing there was a spare half sheet to the papers he so filled up, he advised the prisoner, John Morris, to send it by the post to his father-in-law; but that he replied that his wife was going [\*1478] \*to Portsmouth, on board the *Gladiator*, and that she would get it done. This witness further stated that he afterwards met the prisoner, John Morris, who then told him that he had got the papers regularly signed by Henry Taylor and the captain: and that he was going to send his wife to Greenwich Hospital for the money. Upon this evidence it was submitted by the counsel for the prisoners that as Sarah Morris, in the part she took in this transaction, had clearly acted under the directions and coercion of her husband, she could not be found guilty; (*a*) and that if she was innocent as a principal, the other prisoner could not be guilty as an accessory. And the jury having found both the prisoners guilty, the case was reserved for the consideration of the twelve Judges; who were unanimously of opinion that the prisoner, Sarah Morris, was guilty of uttering the forged instrument, knowing it to be forged; and that the prisoner John Morris, her husband, was guilty of the offence with which he was charged in the indictment, namely, that of an accessory before the fact at common law. (*b*)

Hughes's case. Objection overruled as to the coercion of a husband in a case of forgery.

In a case which occurred a short time before that which has been just cited, the question of the coercion of a husband upon a wife, in the offence of forgery, came under the consideration of a very learned Judge. The prisoner, Martha Hughes, the wife of Patrick Hughes, was indicted for forging and uttering three two pound Bank of England notes. The principal witness stated, that in consequence of a conversation which he had had some time before with the prisoner's husband, he went to the husband's shop; that the husband was not present, but that he saw the prisoner, who beckoned him to go into an inner room; that she followed him into the room, and that he there told her what her husband had said to him; upon which they agreed about the business, and he bought of her three two pound notes at one pound four shillings each:—that he paid her for the [\*1479] \*notes, and was to receive eight shillings in change. He further stated, that when he was putting the notes into his pocket-book, and be-

*a* Ante 23, 24.

*b* Morris, John and Sarah (case of) *Mord.*

*store*, 1814. 2 Leach 1096

fore he had received the change, the husband put his head into the room and looked in; but did not come in, or interfere in the business, further than by saying, "Get on with you." After this the witness and prisoner returned into the shop, where the husband was; the prisoner gave him the change, and both the prisoner and her husband cautioned him to be careful. On these circumstances being proved, the counsel for the prisoner objected, that it clearly appeared that she acted under the coercion of her husband: that, in case both the husband and wife had been on their trial, this evidence would have been sufficient to have convicted him; and, therefore, he contended that the wife ought to be acquitted. And he referred to 2 East. P. C. c. 16. s. 8. p. 559. 1 Hale 46. Kel. 37. But Thomson, B. stopped the counsel for the prosecution, saying, "I am very clear as to the law on this point. The law, out of tenderness to the wife, if a felony be committed in the presence of the husband, raises a presumption *primâ facie*, and *primâ facie* only, as is clearly laid down by Lord Hale, that it was done under his coercion: (c) but it is absolutely necessary that the husband should in such case be actually present, and taking a part in the transaction. Here it is entirely the act of the wife; it is indeed in consequence of a communication previously with the husband, that the witness applies to the wife; but she is ready to deal, and has on her person the articles which she delivers to the witness. There was a putting off before the husband came; and it was sufficient, if before that time she did that which was necessary to complete the crime. The coercion must be at the time of the act done, and then the law out of tenderness refers it *primâ facie* to the coercion of the husband. But when the crime has been completed in his absence, no subsequent act of his (although it might possibly \*make him an accessory to the felony of the wife) can be referred to what was done in his absence. (d)" [\*1480]

It is said by Lord Coke, that to *cause* is to procure, or counsel one to forge; to *assent*, is to give his assent or agreement afterwards to the procurement or counsel of another; to *consent* is to agree at the time of the procurement or counsel, and he in law is a procurer. (e) But it is observed, that the *assent* here mentioned must be understood of an assent to the design of forging, before the fact of the forgery committed; (f) since, according to Lord Hale, an assent after the fact committed makes not the party assenting guilty or principal in the forging; but it must be a precedent or concomitant assent. (g)

Of causing, assenting and consenting.

c 1 Hale 516. *Ante*, 23, 24.

d Hughes's (Martha) case, *cor.* Thomson, B. *Lancaster Lent Ass.* 1813. MS.

e 3 Inst. 169. And in a strict sense he that causes a forgery to be done is a forger

himself; but then it ought to be so laid in the indictment. Per Cur. in *Rex v. Stocker*, 5 Mod. 138.

f 2 East. P. C. c. 19. s. 52. p. 973.

g 1 Hale 684.

## SECTION V.

## OF THE INDICTMENT, TRIAL, EVIDENCE, AND PUNISHMENT.

Of the indictment, trial, and evidence.

Of the indictment. Word "*falsely*."

[\*1481]

The forged instrument must be set forth in words and figures.

It now remains, in conclusion of this Chapter, to mention some of the points of general application concerning the indictment, trial, evidence, and punishment in cases of forgery.

It is usual to charge in the indictment that the party *falsely* forged and counterfeited, &c.: but it is said to be enough to allege only that he *forged and counterfeited* without adding *falsely*, which is sufficiently implied in either of those terms, particularly in the word to *forge*, which is always \*taken in an evil sense in our law. (*h*) It has been holden that an indictment is good, and not repugnant, although it state that the party *falsely* forged a *false* writing. (*i*)

It is essentially necessary to an indictment for forgery, that the instrument alleged to be forged, should be set forth in words and figures; (*k*) though, in general, figures must not be used in an indictment. (*l*) In a case where upon an indictment for forging a receipt for money, it was objected that in the receipt, as set forth, some of the sums were in figures, it was holden that the receipt must be pursued exactly, or it would be a variance. (*m*) The reason for setting out the instrument is that the court may see that it is one of those instruments the falsely making or knowingly uttering of which the law has said shall be considered forgery. (*n*)

The recital of the instrument is usually prefaced by the words "to the tenor following, that is to say," &c. or "in the words and figures following," which imports an exact copy. But where the indictment was for forging a certain receipt for money "as follows," and then set forth the receipt in words and figures, all the judges held that the words "as follows" were to be taken as the same as "as according to the tenor following," or "in the words and figures following;" and that if the prosecutor had failed in evidence in proving the receipt verbatim as laid, it would have been a fatal variance. (*o*) Therefore, though there be \*no technical form of words for expressing that the instrument is set forth in words and figures, it is clear that the prosecutor cannot, by varying

*h* 2 East. P. C. c. 19. s. 57. p. 985. Savage's case, Str. 12. The Latin words were *fabricavit et contrafecit*. Mariot's case. 2 Lev. 221. Dawson's case, 1 Str. 19.

*i* Rex v. Goate, 1 Lord Raym. 737.

*k* 2 East. P. C. c. 19. s. 53. p. 975. Mason's case, *Northumberland Sum. Ass.* 1792, Mich. T. 1792. East. T. 1793. 2 East. P. C. *ibid.*

*l* 1 Chit. Crim. L. 176.

*m* Powell's case, 2 East. P. C. c. 19. s. 53.

p. 976.

*n* Lyon's case, 2 Leach 597, 608.

*o* Powell's case, 2 Black. R. 787, 1 Leach 77. 2 East. P. C. c. 19. s. 53. p. 976. In which last book the learned writer says, that he cannot but question Smith's case, Salk. 342, where it is said in the report that where a deed with the mark I. S. was forged, the indictment need not set out the mark.

the terms in which he introduces the instrument, relieve himself from any accuracy which is otherwise requisite. (p)

But in setting forth the tenor of the instrument, a mere literal variance will not vitiate the indictment. Thus where, upon an indictment which charged the prisoner with forging a bill of exchange, and contained, in the bill set forth, the words "value received," and the bill produced in evidence, though otherwise corresponding with that set forth, was written "value recievd," it was holden that the variance was not material, as it did not change the word. (q) So where the prisoner was indicted for uttering a bill of exchange, directed to Messrs. Masterman, Peters, & Co., with a forged indorsement thereon: and it was objected that there was a variance in the indictment, which imported to set out the bill according to its tenor, inasmuch as the letter *r* in Messrs. was omitted, and the abbreviation Mess<sup>r</sup>. might stand for words which Messrs. could not: the objection was overruled; and the Judges, upon the point being referred to them, held that the indictment was sufficient. (r) But, if by addition, omission, or alteration, the word is so changed as to become another word, the variance will be fatal. (s)

A literal variance will not vitiate.

\*In a case where the note charged to be forged set forth the attestation of the witness, and the words "Mary Wallace, her mark;" and it appeared that when the prisoner subscribed the note those parts of it were not written, it was doubted whether the prisoner had not in fact forged a note differing in the tenor of it from that set forth in the indictment. But it was holden upon consultation that the indictment was in this respect well proved. (t) [\*1483]

It is sufficient (except in the cases which will be presently mentioned) to charge that the defendant forged such an instrument, naming it, and setting forth the tenor; but the laying it to be a paper writing, &c., purporting to be such an instrument (as the statute on which the indictment is framed describes) is good; and it is said that in strictness of language there may be more propriety in so laying it, considering that the purpose of the indictment is to disaffirm the reality of the instrument. (u) In a case where the prisoners had been convicted upon an indictment, charging them with publishing "as a true will a certain false, forged, and counterfeited paper writing, purporting to be the last will of Sir A. C. &c.;" and

Offering it to be a paper writing purporting to be such an instrument, &c.

1 Chit. Crim. L. 1040.

q Hart's case, Worcester Lent. Ass. 1776: and before t in Judges, June 7th, 1776, 1 Leach 145. 2 East. P. C. c. 19. s. 54. p. 977.

r Ollfield's case, cor. Bayley, J., Durham Sum. Ass. 1811. MS.

s Rex v. Bear, Carth. 408. Reg. v. Drake, Salk. 681. 1 Stark. Crim. Plead. p. 242. 1 Chit. Crim. L. p. 294. And in Rex v. Beach, Cowp. 229, where it was holden that in an indictment for forgery, a variance in writing the word underfood instead of

understood was not material. Lord Mansfield said, "The true distinction seems to be taken in Reg. v. Drake, which is this, that where the omission or addition of a letter does not change the word so as to make it another word, the variance is not material."

t Dunn's case, O. B. 1765. 2 East. P. C. c. 19. s. 53. p. 976. It appears that the Recorder at first entertained the doubt, which was removed on consultation with Perrott, B. and Aston, J.

u 2 East. P. C. c. 19. s. 56. p. 980.

setting out the tenor of the will, it was objected that it ought to have been laid that they forged *a certain will*, and not a paper writing, *purporting to be the last will, &c.*, as the words of the statute are “shall forge a will.” But after a variety of precedents being produced, all the Judges held it to be good either way. And it was also holden that as the will was set forth in *hæc verba*, and three names appeared as witnesses, it was sufficient, without stating that it purported to be attested by three witnesses. (x)

[\*1484]

Carter's case. Where the signature to a bill of exchange was a forgery, it was holden that an indictment averring it to be signed by H.H. instead of stating that it purported to have been signed by him, was bad.

\*In a case where the prisoner was indicted for forging, and knowingly uttering a bill of exchange, which was described in the indictment to be “a certain bill of exchange requiring certain persons by the name and description of Messrs. Down, &c. twenty days after date to pay to the order of R. Thomson, the sum of \$15*l.* value received; and signed by Henry Hutchinson, for T. G., T. and H. Hutchinson; which bill of exchange so falsely made and counterfeited, is as follows, (setting out the bill) &c. with intent to defraud G. Hutchinson, &c.,” and it appeared on the evidence that the signature to the bill, “Henry Hutchinson,” was a forgery; it was objected that the indictment averring it to have been signed by him, (and not merely that it *purported* to have been signed by him,) which was a substantial allegation, was disproved. And the Judges were of that opinion, upon the case being referred to their consideration after the conviction of the prisoner. (y)

If the instrument do not purport on the face of it to be the thing prohibited to be forged, the *purport* must be expressly averred.

But the setting out the very subject matter which has been forged, will not, in all cases, be sufficient. For if the instrument do not purport, on the face of it, and without reference to some other subject matter, to be the thing prohibited to be forged, the purport and meaning of the forgery, with relation to such other subject matter, must be expressly averred to be the thing so prohibited. So that where the indictment charged the prisoner with forging a receipt to an assignment of a certain sum in a navy bill and the tenor of the receipt as set forth merely consisted of the signature of the party, it was holden to be defective; on the ground that the mere signing of such name, unless connected with the previous matter, did not purport on the face of it to be a receipt; and that it ought to have been averred that such navy bill, &c. together with such signature, did purport to be, and was a receipt, &c.; and that the prisoner feloniously

[\*1485]

\*forged the same. (z) But where a forged receipt, as set forth in the indictment, was in this form “18th March, 1773. Received the contents above by me Stephen Withers,” and

x Birch and Martin (case of) 1771. 2 Black. R. 790. 1 Leach 79. 2 East. P. C. c. 19. s. 56. p. 980. There was a third objection also that the indictment only averred, “they knowing it to be forged, &c.” whereas it should have been that “they and each of them, &c.” &c., but it was overruled. The

prisoners were executed.

y Carter's case, 1800, 2 East. P. C. c. 19. s. 56. p. 985.

z Hunter's case, O. B. 1794, East. T. 1796. 2 Leach 624. 2 East. P. C. c. 19. s. 36. p. 928, 929. and s. 53. p. 977.

it appeared in evidence that such receipt was forged at the bottom of a certain account; upon objection taken that the account itself should have been set forth in order to make it appear that the receipt, as stated, was a receipt for money, all the Judges held that the indictment was sufficient; and that the account was only evidence to make out the charge as stated in the indictment. (a) It is observed upon this case that by the very terms of the writing itself, it purported to be a receipt for something, though not specifically for money, as it was averred to be in order to bring it within the the statute 2 Geo. II. c. 25. (b)

But with respect to the word “purport” it should be well observed that it imports what appears *on the face of the instrument*; as a want of attention to this meaning of the word has been fatal to many indictments.

In a case where the instrument was laid in some counts of the indictment to be *a paper writing purporting to be a bank note*, it was holden that as it did not purport on the face of it to be a bank note, the counts could not be supported. (c)

\*In another case the bill of exchange upon which the indictment proceeded was in the following form :

*Bristol, Feb. 21st, 1792.*

Forty days after date pay to Mr. Jeremiah Reading, or order, the sum of £80. for value received, and place it to the account of

JOHN WHITE.

To JOHN RING, Esq.

*Berkley-street, Portman-square, London.*

And the indictment charged that the prisoner, having such bill in his possession, *purporting to be signed by one John White, and to be directed to one John King, by the name and description of one John Ring, Berkley-street, &c.*, forged an acceptance in writing *purporting to be the acceptance of the said John King*. The bill, when produced, appeared to be accepted on the back of it by John King; and it was proved that when the prisoner negotiated the bill he stated that Mr. King was a gentleman living in Berkley-street, Portman-square, and a man of opulence; but in fact there was no person of that name living there. The prisoner having been found guilty, the case was submitted to

But the word *purport* imports what appears *on the face of the instrument*.

Jones's case.

[\*1486]

Reading's case.

Where the indictment charged that the defendant being possessed of a bill of exchange *purporting to be directed to one John King, by the name and description of one John Ring*, forged the acceptance of the said John King, it was holden to be

a Testick's case, 1774, 2 East. P. C. c. 19. s. 36. p. 925. 1 East. R. 181. note (a)

b 2 East. P. C. c. 19. s. 53. p. 977. And the learned writer refers to Taylor's case, 1 Leach 215. 2 East. P. C. c. 19. s. 47. p. 960. ante 1429; where the prisoner was indicted for forging a receipt for 20l. due upon a bill of exchange in these words, “Received, W. Wilson;” and the indictment set

forth the bill for 20l., and averred the forging of a receipt for the *said* sum of 20l., but contained no averment that the writing forged, together with the bill, purported to be or was a receipt: and he observes that here also the forged writing in itself purported to be a receipt for something.

c Jones's case. ante 1452.



bad, on  
the ground  
that *Ring*  
does not  
purport to  
be *King*.

[\*1487]

the consideration of the twelve Judges, who determined that judgment ought to be arrested on the ground that the bill did not in fact *purport* to be directed to one John King, as stated in the indictment. Buller, J., in delivering the opinion of the Judges, said, "It is clear that where an instrument is to be set forth, the description, that it *purports* a particular fact, necessarily means that what is stated as the purport of the instrument appears on the face of the instrument itself. On the face of the bill of exchange in the present case (and the face of the bill is the only thing to be considered) nothing more appears, when we examine the averment, than that it is a bill of exchange drawn by *John White on John Ring*; therefore, when the indictment says that it was drawn on *John King*, by the name and description of *John Ring*, it is absurd and repugnant \*to itself; for the name and description of one thing cannot purport to be another thing. The drawer of the indictment was led into this blunder by not considering what was the original state of the bill, and what was the appearance of it after the acceptance was put on it; it seems as if he did not recollect under what terms, or by whom, a bill of exchange may be accepted. Though the bill was drawn on *John Ring*, it might have been accepted by *John King*, for a bill may be accepted by other persons than those to whom it is directed, as when it is accepted for the honor of the drawer, or of any of the indorsers." (d)

Gilchrist's  
case.

An indictment for forging a bill of exchange directed to *Ransom, Moreland, and Hammersley*, which stated that such bill purported to be directed to *George Lord Kinnaird, William*

In a case which occurred shortly afterwards, the prisoner was indicted for forging "*a paper writing, purporting to be an order for payment of money, dated 11th September, 1794, with the name Thomas Exon thereunto subscribed; purporting to have been signed by Thos. Exon, clerk, and to be directed to George Lord Kinnaird, Wm. Moreland, and Thos. Hammersley, of, &c. bankers and partners, by the name and description of Messrs. Ransom, Moreland, and Hammersley, for the payment of the sum of 10l., &c.:*" the tenor of which said false writing, &c. is as follows, viz.

"Messrs. Ransom, Moreland, and Hammersley, please to pay to Mr. Brooks, or bearer, the sum of Ten Pounds, for  
THOS. EXON.

Sept. 11th 1794."

with intent to defraud the said Geo. Ld. K., &c. There [\*1488] \*was a second count, for uttering it; and other counts, charg-

d Reading's case, O. B. 1793, Hil. T. 1794. 2 Leach 590. 2 East. P. C. c. 19. s. 56. p. 981. Buller, J., also said that as the opinion of the Judges proceeded merely on the informality of the record, the prisoner might be

again indicted for this offence. But no other indictment was preferred; and after remaining in custody till March, 1794, he received a free pardon, and was discharged, 2 Leach 593.

ing an intent to defraud other persons. An objection was made in arrest of judgment, that the direction of the bill was improperly described in the indictment; and ten of the Judges, who met to consider the case, were unanimously of opinion that the judgment should be arrested, on the ground that the word *purport* imports what appears on the face of the instrument, the apparent and not the legal import; and that the bill in question could not purport to be directed to Lord Kinnaird, because his name did not appear upon the face of it. Buller, J., in delivering their opinion, said, "Old cases have given rise to much learning and argument on the words '*purport and tenor*,' and the books are full of distinctions as to the meaning of these words, and the necessity of using the one or the other of them in indictments where written instruments are to be stated; but, among the many cases upon this subject, I can find no judicial determination that *the purport* and *the tenor* should both be stated in any case whatever. Purport means the substance of an instrument, as it appears on the face of it to every eye that reads it: tenor means an exact copy of it; and, therefore, where an instrument is stated according to its *tenor*, the *purport* of it must necessarily appear. The forms of indictments for forgery have varied, and been different from each other at different periods of time; and of late years they have been much more complicated than they were formerly; and, in my opinion, they have been, for that reason, much worse. I have seen the precedent of an indictment of forgery, stating, 'the prisoner to have forged a certain false paper-writing, in the name of J. S. and others, bearing the form of a warrant of attorney, which said writing follows in these words; that is to say, &c.' setting it out *verbatim*; and if indictments for forgery were now merely to state that the prisoner 'forged a paper-writing to the tenor and effect following, &c.;' and the instrument set out appeared on the face of it to be a bond, or bill of exchange, or any other of the instruments described in the statute, I should, \*as at present advised, see no objection to such a form. If, in the present case, the indictment had stated that the prisoner had forged a certain paper-writing, in the name of T. Exon, (e) purporting to be a bill of exchange, and then set out the bill to the tenor and effect following, it would, I think, have been quite enough; for the words 'purporting to be a bill of exchange,' are only necessary to shew that the instrument supposed to be forged is one of the instruments mentioned in the statute; and, in order to shew that it is one of those instruments, it cannot be necessary, under the word 'purporting,' to recite all the contents of the instrument; for an exact

and Thomas Hammersley, by the name and description of Ransom, Moreland and Hammersley, was holden to be bad: on the principle that the word *purport* signifies that which appears on the face of the instrument.

[\*1489]

e But it would not have been good to have averred that the paper writing *was signed* by T. Exon; such signature being a forgery. and

the paper, therefore, not in fact so signed. See Carter's case. *ante*. 1484.

copy of the instrument itself being set forth, all its contents thereby appear; and the law requires an exact copy of the instrument to be inserted in the indictment, in order that the court may see that the instrument is the subject of forgery within the meaning of the statute. The blunder in the present indictment seems to have arisen from the circumstance of *Lord Kinnaird*, and *Messrs. Moreland* and *Hammersley* carrying on the banking business under the firm of *Messrs. Ransom, Moreland, and Hammersley*. The pleader who drew it, forgetting that it was wholly immaterial whether such a firm as *Ransom, Moreland, and Hammersley*, ever existed, or who were the persons who constituted that firm, and, conceiving it to be material that the names of the real partners interested in the business should be mentioned, has taken great pains to shew that a bill, drawn on '*Ransom, Moreland, and Hammersley*,' was drawn on '*Lord Kinnaird, Moreland, and Hammersley*;' and, in order to do that, he has averred in the indictment that the bill purports to be drawn on '*Lord Kinnaird, Moreland, and Hammersley*.' But the purport of an instrument, as I have already observed, \*is that alone which appears on the face of it; and, on the face of this bill, Lord Kinnaird's name does not appear, and therefore the averment is not true." (f)

[\*1490]

Edsall's case. The same doctrine was again acted upon in this case.

This doctrine was again acted upon in a case where the indictment charged the prisoner with forging a certain paper writing, purporting to be an inland bill of exchange, and to be drawn by one C. W. Wright, bearing date, *Winchester, 14th Nov. 1796*, and to be directed to *Richard Down, Henry Thornton, John Freer, and John Cornwall the younger*, bankers, London, by the name and description of *Messrs. Down, Thornton, and Co.* bankers, London, requiring them, ten days after date, to pay to Mr. Wm. Simmons, or order, 8*l.* 10*s.*, &c., and then setting out the tenor, by which the bill appeared, as the fact really was, to be directed, "*Messrs. Down, Thornton, and Co.*," bankers, London. (g)

Reeves's case. An indictment for forging a scrip receipt, signed "C. Olier;" stated that the prisoner forged the receipt

In a case which occurred about the same time, the indictment, which was for forging a scrip receipt, charged that the prisoner forged it "with the name C. Olier thereunto subscribed, purporting to have been signed by one Christopher Olier;" and it was objected that this must necessarily be bad, as C. Olier "did not, on the face of it, purport to be Christopher Olier, but might be Charles, &c." But the court thought that this case differed in some degree from the two cases cited in support of the objection, namely, Jones's case, (h) and Gil-

f Gilchrist's case, O. B. 1795, East T. 1795. 2 Leach, 657. 2 East. P. C. c. 19. s. 56. p. 982.

g Edsall's case, 1798, 2 East. P. C. c. 19. s. 56. p. 984. 2 Leach, 662, note (a). In East. P. C. *ibid.* it is said that the Judges held the

indictment bad, upon the authority of Gilchrist's case, though Buller, J., disapproved much of that determination; which, however, he admitted, could not be distinguished from the present case.

h *Ante*, 1452. 1485.

christ's case; (i) inasmuch as the note in Jones's case did not purport to be a bank note, and, therefore, the indictment, charging that it did so purport, was bad; and in Gilchrist's case, as the name of Lord Kinnaird \*did not appear on the face of the bill, it could not purport to be directed to him: but that, in the present case, this scrip receipt being subscribed with the name C. Olier, and the indictment charging that it purported to be signed in the name of Christopher Olier, a cashier of the bank of England, it was not, upon the face of it, repugnant to the bill, or inconsistent with itself. (k)

“ with the name C. Olier, thereunto subscribed; purporting to have been signed by one Christopher Olier.” Qu. if this differs from the foregoing cases?

Of the statement of the intent to defraud.

We have already considered the purpose of fraud and deceit, to the prejudice of another's right, which makes a part of the definition of forgery. (l) Such purpose or intent to defraud must be stated in the indictment, and pointed at the particular person or persons against whom it is meditated. (m)

In stating this intent to defraud, it will be sufficient to describe the party intended to be defrauded with reasonable certainty.

Accordingly, where after conviction a motion was made in arrest of judgment, that the indictment charged the forged order as being drawn on *Messrs. Drummond and Company, Charing Cross*, by the name of *Mr. Drummond, Charing Cross*, (n) instead of mentioning the names of the respective partners, which ought to have been inserted in the place of the short description *Drummond and Company*, all the \*Judges held, upon a conference, that the indictment was good. They were of opinion that, if the words, “ *Messrs. Drummond and Company, Charing Cross*,” when taken together, had been so senseless and unintelligible as not to import a certain description of persons, the indictment would have been bad; but they said that, understanding those words as every body else did, namely, as meaning the partners in the partnership of the banking-house, they considered them as a sensible and certain pointing out of the persons intended by the draft, and as conveying with legal certainty a notification of the party intended to be defrauded. That it was not necessary in this part of the indictment to describe the party meant with more particularity; for, if any person could be intended from the words, who that person was, and whether he was

Lovell's case. An indictment which stated that a forged order was directed to [\*1492] Messrs. Drummond and Company, by the name of Mr. D. &c. was holden to be good; and that it was not necessary to state the names of the respective partners.

i *Ante*, 1487.

k *Reeves's case*, cor. Heath and Lawrence, J., and Thomson, B., O. B. 1798, 2 Leach, 808. 814. 2 East. P. C. c. 19. s. 56. p. 984. The point was saved for the consideration of the twelve Judges: but it does not appear what their opinion was, there being other objections to the conviction of the prisoner; who was afterwards tried and capitally convicted on another indictment pending for the same offence.

l *Ante*, 1411. 1471. *et sequ.*

m 2 East. P. C. c. 19. s. 58. p. 988.

n The order was in the following form:—

*Mr. Drummond, Charing Cross,*  
25 August, 1782.

Please to pay the bearer, or order, on demand, 10*l.* 10*s.*; and place it to account, per me,

H. H. ASTON.

the meditated object of the fraud, were matters for the consideration of the jury. (o)

[\*1493]

It is not necessary to state in the indictment the manner in which the party was to have been defrauded.

\*It has been holden not to be necessary to state in the indictment the manner in which the party was to have been defrauded.

Thus, where it was objected, on a motion in arrest of judgment, that it was not averred that T. Barrow, whose name appeared to be signed to the forged receipt, meant Taylor Barrow, (with intent to defraud whom the forgery was laid in one of the counts;) that the manner in which the forged receipt of stock was to operate in prejudice of Mr. Barrow ought to have been averred in the indictment, by a statement of Taylor Barrow being the proprietor of so much stock, and being personated by the prisoner, who transferred it, &c.; and that it was not sufficient merely to state that the forgery was committed with intent to defraud T. B. generally; the Judges held that it was sufficient if the offence was described in the words of the act; and that, whether it were or were not meant to defraud Taylor Barrow, was matter of evidence, which the jury had found. (p)

It need not be averred that a forged bill of exchange was tendered to the party in-  
[\*1494] tended to be defrauded; nor in

And in another case, where Buller, J., upon a conference with the rest of the Judges, stated, as an objection to an indictment, that it was not alleged that the bill was uttered or tendered to the persons whom it was laid the prisoner meant to defraud; and, therefore, that it did not appear to the court, on the face of the indictment, that those persons \*could be defrauded by the transaction, which always appeared where the name of a drawer, acceptor, or indorser, was forged; all the other Judges held that the indictment

o Lovell's case, O. B. 1782, and 6th November, 1782, 1 Leach, 248. 2 East. P. C. c. 19. s. 60. p. 990. It should be observed, that those counts of the indictment which stated the intent to defraud Messrs. Drummond and Co., laid such intent in the *concluding parts* of the counts to be to defraud Robert Drummond, and the other partners in the house, *by name*. But that which Gould, J., is reported to have said, (2 East. P. C. *ibid.*), would seem to lead to the conclusion that it is not necessary to specify the names of the partners in any part of the count: viz. "That to require the particularising of all the partners would be of dangerous consequence to such prosecutions; some of them might not be known." A learned writer, (after stating that there are always several counts in the indictment, charging an intent to defraud all such persons, or bodies corporate, as could be affected by the success of the forgery,) suggests that, as the intention to commit a fraud at the time of the forgery is usually general, and intended to impose rather upon the person to whom the forged instrument may be accidentally offered, (particularly in the case of bank notes, and negotiable in-

struments,) it would be desirable to pass an act rendering it unnecessary to state the name of any person or corporation, intended to be defrauded; 6 Ev. Col. Stat. Pt. V. Cl. XII. p. 581, 582. With respect to the statement in that part of the indictment which came in question in Lovell's case, it appears to have been the opinion of Buller, J., and the other Judges, that, if the words "*Messrs. Drummond and Company, Charing Cross*," had been omitted, and the indictment had only stated, according to the fact, that the bill was directed to "*Mr. Drummond, Charing Cross*," (*ante*, note (n),) it would have been sufficient. 2 East. P. C. c. 19. s. 60. p. 991.

p Powell's case, 1771, 2 East. P. C. c. 19. s. 59. p. 989. 1 Leach, 77. In East, a further ground for the opinion of the Judges is thus stated: "Besides, there was a second count, wherein the offence was laid with intent to defraud one Sykes. If, therefore, there were no such person as Taylor Barrow, or if he had no stock; yet, as the receipt had in form the constituent parts of a receipt for the transfer of East India stock, that was sufficient."



was good in this respect, as it was sufficient to pursue the words of the act, which constitute the offence; and it was matter of evidence, whether the prisoner intended to defraud the persons named by tendering the bill in payment to them, or how otherwise. (q)

what other manner the party could be defrauded.

The following case relates to the property of the party against whom the intent to defraud is aimed, in the monies, &c. sought to be obtained for the forgery.

As to the property of the party intended to be defrauded in the monies, &c. sought to be obtained.

Two prisoners, Mary Jones and Henry Palmer, were indicted for the forgery of an indenture of apprenticeship, and also of a receipt for money, with intent to defraud A. B., C. D., &c. *the stewards of the feast of the sons of the clergy.* It appeared that the charitable fund of the sons of the clergy was raised by voluntary contributions, and allotted by the secretary equally among all the stewards, to be disposed of by them to the widows and children of deceased clergymen, according to their discretion; that the prisoner, Jones, was a clergyman's widow, and that, pretending, by means of the indentures in question, and the receipt indorsed thereon, that she had placed her son as an apprentice, she obtained, in concert with the other prisoner, an order from one of the stewards, on the treasurer of the society, for 20*l.*, as an apprentice-fee. The prisoners, having been found guilty, it was submitted that the offence amounted only to a misdemeanor at common law, and that this was not such a species of property as fell within any of the acts relating to forgery. But Eyre, B., said, that the several stewards were the absolute owners of their respective shares of the fund; that it was their money, put into their hands upon a trust; and if they had sunk it improperly, or paid it wrongfully, \*they would perhaps be answerable; and that, unquestionably, it was their money, as against all the world, except the subscribers. (r)

Jones and Palmer's case.

[\*1495]

Where there is an incorporation, the money becomes the property of the whole body, and not of the individual members who compose it. And the statutes 31 Geo. II. c. 22. s. 78. and 18 Geo. III. c. 18. were passed to obviate the objection that the word "person" in the statutes 2 Geo. II. c. 25. and 7 Geo. II. c. 22. (relating to the forgery of deeds, wills, bonds, bills, &c.) did not extend to the aggregate members of a corporation. (s)

Where the persons defrauded are a corporation.

If the indictment proceeds upon a statute, the charge must, in general, be set forth (according to the established rule applicable as well to other cases as to forgery) in the very words of the statute, describing the offence. (t)

q *Elsworth's case*, 1780, 2 East. P. C. c. 19. s. 52. p. 989., and s. 58. p. 988.

r *Jones and Palmer, (case of) cor. Eyre*, B., O. B. 1785. 1 Leach 366. 2 East. P. C. c. 19. s. 60. p. 991.

s *Harrison's case*, 1777, 1 Leach 180. 2 East. P. C. c. 19. s. 59. p. 988. See the Statutes referred to, *post*, Chap. XXIV. t 2 East. P. C. c. 19. s. 58. p. 985.



But an indictment for forging a stamp on foreign muslins, which stated the duty to be chargeable *for, on, and in respect of*, foreign muslin, was holden good; though the words of the statute in the clause imposing the duty were, *for and upon*; in other clauses, *for*; in others, *on*; and in others, *upon*. (u)

As to a superfluous description.

[\*1496]

It is said that a superfluous description does not appear to be objectionable. (a) And a case is cited where, upon an indictment on the statute 2 Geo. II. c. 25. for forging "a bond *and* writing obligatory," it was objected that, as the statute uses the term *bond* as well as the term *writing obligatory*, the indictment ought to have described the offence more particularly, either as a forgery of the one or the other; that it should have described the instrument in this case as a *writing obligatory*, as it had neither a defeasance nor penalty annexed to it; and that, although a bond were a writing obligatory, yet the converse did not hold: and by the opinion of the Judges the indictment was holden good. (y) With respect to the inference from this case that a superfluous description does not appear to be objectionable, a learned writer says that he is by no means satisfied that the term *bond* is not properly applicable to an obligation without a condition, although, for the sake of distinction, it is more usually called a single bill. (z)

The word "alter" used in the indictment, though not in the statute.

An indictment on the statute 2 Geo. II. c. 25. which charged that the prisoner "did feloniously *alter* and cause to be altered a certain bill of exchange, by *falsely making, forging, and adding*, a cypher 0 to the letter and figure £8. &c." was holden good, though the words of the statute are "if any person shall *falsely make, forge, or counterfeit*," and the word *alter* is not used in the statute. (a)

If any part of a true instrument be altered, a forgery of the whole instrument may be laid in the indictment.

[\*1497]

In this case the Judges held that there was no difference in substance or in the nature of the charge, whether the indictment were for feloniously altering by *falsely making and forging*, or for feloniously making and forging by *falsely altering*, &c. (b) We have already seen that if any part of a true instrument be altered, the offence may be treated as a forgery of the whole instrument, and be so laid in the indictment. (c) But it appears to have been more usual to lay forgeries of this kind by stating the particular alteration, at least in one count. (d)

u Hall and Crutchfield, (case of,) 1795. 2 East. P. C. c. 19. s. 19. p. 895., and s. 38. p. 988. *post*. Chap. XXXII.; and an indictment at common law was holden bad for uncertainty, which stated that the defendant forged, or caused to be forged, a bill of lading, Rex v. Stocker, 5 Mod. 137. 1 Salk. 342. 371.; and see Walcot's case, Holt's R. 345.

r 2 East. P. C. c. 19. s. 58. p. 935

y Dunnett's case, O. B., 1792, East. T. 1793. 2 East. P. C. c. 19. s. 58. p. 985.

z 6 Ev. Col. Stat. Pt. V. Cl. XII. p. 581. And he refers to 2 Black. Com. 340.

a Elsworth's case, York Lent Ass. 1780. and before all the Judges, 12 April, 1780, 2 East. P. C. c. 19. s. 58. p. 986. 988.

b *Id. ibid.*

c *Ante* 1413. *et sequ.*

d 2 East. P. C. c. 19. s. 55. p. 930.

In a case where the prisoner was indicted for forging a will, on his arraignment he pleaded *autrefois acquit*; upon which the plea was taken *ore tenus*, and recorded by the clerk of the arraigns, who replied to it, on the part of the crown, *nul tiel record*. In order to prove the plea, the record of a former acquittal of the prisoner was produced; but, on comparing it with the present indictment, it appeared that the prisoner had been acquitted of uttering a forged will, beginning, "*I, James Gibson, do hereby,*" &c. but that he was now indicted for uttering a forged will, beginning "*James Gibson do hereby,*" &c. The question, therefore, was, whether this record was legal evidence of the prisoner having been acquitted of the same offence? And, after argument by the prisoner's counsel, the court rejected the proof as insufficient; the prisoner pleaded the general issue to the felony, and the jury found him guilty of the offence. (e)

Plea of *autrefois acquit*.

The offence of forgery at common law cannot be tried at the quarter sessions, that court having no jurisdiction over it; nor can they take cognizance of it as a cheat. (f) And it has been holden in several cases that the quarter sessions have no jurisdiction in cases of forgery upon the statute 5 Eliz. \*c. 14. (g) Lord Kenyon, C. J., in speaking of the general jurisdiction of the quarter sessions, after deciding that the offence of soliciting a servant to steal his master's goods is cognizable by that jurisdiction, as falling within that class of offences, which being violations of the law of the land, have a tendency, as it is said, to a breach of the peace; proceeds thus,—“To this general rule there are indeed two exceptions, namely, forgery and perjury; why excepted I know not; but having been expressly so adjudged, I will not break through the rules of law.” (h)

Trial of forgery. The quarter sessions have no jurisdiction.

[\*1498]

The trial of forgery must be had in the county where the offence is committed, as the indictment can only be preferred in that county. And as it seldom happens that direct proof can be given of the very act of forgery, difficulties have sometimes occurred, in cases where there has been no offence of uttering by the prisoner, as to what shall be deemed sufficient evidence of the fact of forging within the county laid.

Trial must be in the county where the offence is committed.

Two prisoners were indicted, the one, Parkes, for forging, Parkes and

e Coogan's case, O. B., 1787, 1 Leach 448. So in Reading's case, ante 1487, note (d), Buller, J. said that the judgment being arrested for the informality of the record the prisoner might be again indicted for the offence. And in Gilchrist's case, ante 1487, as the objection taken went only to the form of the indictment, and not to the merits of the case, the prisoner was remanded to prison till the end of the sessions, that the prosecutor might be at liberty to prefer a better indictment

against him if he thought fit. In the above case of Coogan, the prisoner's counsel chiefly relied upon Lord Hale's construction of Vaux's case, (2 Hale 246.) as reported by Lord Coke, 4 Co. 44. 3 Inst. 214.

f Yarrington's case, 1 Salk. 406. Rex v. Gibbs, 1 East. R. 173. 2 East. P. C. c. 19. s. 7. p. 864. 2 Hawk. P. C. c. 8. s. 64.

g Smith's case, Cro. Eliz. 87. Wilson's case, *Id.* 601. Hunt's case, *Id.* 697.

h Rex v. Higgins, 2 East. R. 18.

Brown's case. The bare fact of a forged note being uttered in a particular county by one prisoner, is no evidence of the forgery having been committed in that county by another prisoner, though an accomplice of the utterer.

[\*1499]

the other, Brown, for uttering a forged promissory note for five guineas. It appeared clearly, that Parkes had forged the note: but the only evidence offered, to shew that the forgery was committed in *Middlesex*, where the venue was laid, was that the prisoner Brown, between whom and Parkes there was a great intimacy, had uttered it in *Middlesex*, in the absence of Parkes, who was not proved to have been cognizant of the fact, and that above forty of the same sort of five guinea notes in blank, without any signature, were found upon Parkes, in the same county, together with a receipt, under cover addressed to Brown, for £21 for four five guinea bills. It appeared, that all the notes found upon Parkes, as well as that upon which the indictment proceeded, were dated "Ringhton, Salop." Both the prisoners having been convicted, the case was referred to the consideration of the twelve Judges. Some of the Judges were of opinion, that the fact of finding the forged instrument in the county, in which also it appeared that the forger himself was, was evidence, in the absence of other proof, of the fact of the forgery having been there committed. But the majority of them, though they agreed that it was a question of evidence for the jury, were of opinion that there was no proof to warrant the conclusion that the forgery was committed by Parkes in *Middlesex*, where it was laid: for they thought that the bare fact of the note being uttered in *Middlesex* by the other prisoner, taking him even to be an accomplice, was no evidence of the forgery itself having been committed in that county. (i)

Crocker's case. The finding a forged note in the custody of a person is not evidence that it was forged in the county where it was found; especially in a case where from the circumstances there is a presumption that it was forged in another county.

In a more recent case it is reported, as the opinion of a majority of the Judges, that the finding a forged instrument in the custody of a person is no evidence that it was forged in the county where it was found. The prisoner, Benjamin Crocker, was indicted at Salisbury, in the county of *Wills*, for the forgery of the note in question. From the evidence it appeared, that the prisoner had formerly lived at Wingham, in the county of *Somerset*, where he followed the employment of a farmer for many years. About the month of June 1804, he quitted his farm, and all his concerns at Wingham; at which place one William Tucker, in whose name the forged note purported to be signed, resided, and also carried on the farming business there, at the time of the trial. In November, 1804, the prisoner, having changed his name from Crocker to Collins, went with his wife to *Salisbury*, where he took lodgings, and continued to live until about the middle of the month of May, 1805, when he left his wife at her apartments in Salisbury, and went London. During his stay in London, he was apprehended there on another charge;

i Parkes and Brown, (case of), 1796. 2 and s. 61. p. 992. *Ante*, 1417. Leach 775. 2 East. P. C. c. 19. s. 49. p. 963.

in consequence of which, his lodgings \*at Salisbury were searched, in the presence of his wife; he being still in London; and in a bureau belonging to the prisoner was found a pocket-book, in the inside of which was written his name, B. Crocker, in his own hand-writing; and in one of the pockets of this pocket-book was found the note, set forth in the indictment, which was dated on the 7th March, 1803, and on which was an indorsement that a year's interest had been paid. It was objected upon this evidence that there was nothing to shew that any offence had been committed in the county of *Wilts*, the prisoner not having been in that county, but in *Somersetshire*, at the time when the note appeared to bear date; and the point was submitted to the consideration of the Judges. No opinion of the Judges upon the case was ever publicly delivered; but the prisoner received a pardon, and was discharged; and it is said to have been understood, that a majority of the Judges thought there was not sufficient evidence that the offence was committed in the county of *Wilts*. (j)

It was observed by the counsel who argued the last mentioned case that in Elliott's case (k) the forged instrument was found upon the prisoner in *Kent*, where the indictment was laid; but that no evidence was given to prove the actual fabrication of the instrument in that county; and, on the contrary, the circumstances of the case afforded some inference that the forgery was not committed there. It appeared, that one Ryland, having struck off a quantity of notes, delivered them, together with the plates, to the prisoner, at a public house in *Fleet Ditch*. The note in question was found upon the prisoner at *Dover*, and the plate at a lodging upon *Tower-hill*; yet the objection that the evidence did not afford proof of the offence being committed in *Kent* was either overlooked or thought of no weight. (l)

Of the incompetency of the party by whom the instrument purports to be made to prove it forged.

\*The evidence in forgery must support the material facts stated in the indictment: and it is essentially necessary, that the proof should tally with the averment of the intent to defraud. (m) And we have seen, that the manner in which the fraud was carried or intended to be carried into effect is peculiarly matter of evidence. (n)

[\*1501] Of the evidence.

In respect of the persons who may be witnesses in cases Of the in-

j Crocker's case, 1805. 2 Leach 988. 2 New Rep. 87. But *qu.* if the only point actually decided by the Judges in this case was not "that an incompetent witness had been admitted?" As to which see *post*.

k *Ante*, 1447.

l In 6 Ev. Col. Stat. Pt. V. Cl. XII. the learned writer says, "I remember a case at Lancaster, in the year 1798, where a clerk of a mercantile house at Liverpool had stolen several bills, and was afterwards apprehended on board a sloop in the Downs, with a forged

indorsement of the drawee on one of the bills; and Rooke, J. without any evidence to shew a greater probability of the forgery being committed in Lancashire than in any intermediate county, thought there was enough to go to the jury; who, however, acquitted the prisoner." There certainly does not appear in this statement any thing which could have warranted the jury in coming to a different conclusion.

m *Ante*, 1491.

n *Ante*, 1492, *et sequ*

compe-  
tency of  
the party  
by whom  
the instru-  
ment pur-  
ports to be  
made to  
prove it  
forged.

of forgery, it should be well observed, as an established point, that a party by whom the instrument purports to be made is not admitted to prove it forged, if, in case of its being genuine, he would either be liable to be sued upon it, or be deprived by it of a legal claim against another. This is an exception to the general rules by which testimony in criminal cases is regulated, and has often been spoken of as an anomaly in the law of evidence: but it is now too well recognized to be disputed. Lord Ellenborough, C. J. in speaking of it said, "Upon what principle that anomalous case was so settled, I cannot pretend to say; but having been so settled, it may be too much for Judges sitting on trials to break in upon it. The anomaly can only be remedied now by the legislature." (o)

[\*1502]

Some of the cases in which the point has been decided may be briefly mentioned. On an information for the forgery of a deed, purporting to be the revocation of a will, it was \*adjudged by the Barons of the Exchequer, after a conference with the Judges of the King's Bench, that no legatee named in the will, nor any person who is a loser by the deed, or who may receive any advantage from the verdict, can be a witness for the prosecution. (p) In a case where the name of a person was forged to a receipt, such person was holden to be an incompetent witness to disprove the handwriting. (q) So where the indorsement of one Gardiner was forged upon a promissory note, made payable to him or order, it was holden that Gardiner could not be a witness to prove that the handwriting was not his. (r) And where a person, having a bill of exchange in his possession, indorsed a receipt upon it in a fictitious name, the acceptor was holden not to be a competent witness to prove the payment without a release from the indorsee. (s) So a person whose handwriting was forged to a letter of attorney, to receive stock, was holden incompetent to disprove his handwriting. (t) And the like determination was made in the case of an assignee of a certificate to a navy bill, whose name was charged to have been forged to a receipt for the money. (u)

And it  
seems that  
such party  
is incompe-  
tent to

It seems to be the prevailing opinion, that the incompetency of such witness is not confined to the single point of falsifying the handwriting, but that he is equally incompetent to prove any other fact which contributes to the proof

o By Lord Ellenborough, C. J. in *Rex v. Boston*, 4 East. 582. See the grounds of the anomaly discussed in 2 East. P. C. c. 19. s. 62. p. 993 and Phil. on Evid. 94.

p Watt's case, 3 Salk. 172, reported more fully in Hardr. 331. In Phil. on Evid. 94, note (4), the learned author observes, that in 4 Burr. 2254, Lord Mansfield says, that this, and other cases of the same kind, were "not considered, or looked into."

q Russel's case, O. B. 1737, 1 Leach 8. Reeves's case, 2 Leach 812.

r Caffy's case, O. B. 1729. 2 East. P. C. c. 19. s. 63. p. 995.

s Taylor's case, O. B. 1779, 1 Leach 214.

t *Rex v. Rhodes*, 2 Str. 728.

u Thornton's case, O. B. 1794, 2 Leach 634.



of the forgery; or, in other words, any fact conducive to the general conclusion. (x) An executor of a person, whose promissory note had been forged, was rejected as a witness to prove what the prisoner said to him when he tendered him the note for payment. (y) This subject was much discussed in a late case, where, on a prosecution for forging a promissory note, on which there was an indorsement in the prisoner's handwriting of a year's interest having been paid, a question was made, whether the person by whom the note purported to be made might prove that he had never paid any interest on the note, as was pretended by the indorsement. The evidence was received at the trial, after proof of the fact of the forgery being first given; but the point was reserved for the consideration of the twelve Judges, and it seems to have been generally understood that the majority of them considered the evidence inadmissible. (z) It is said that Lord Ellenborough, C. J., Macdonald, C. B., Lawrence, J., and Le Blanc, J., thought the witness admissible, because it had been sufficiently proved before that the note was not signed by him; and that they thought him admissible to all points except that of the forgery: but that some of the other Judges, though they seemed to think that on points perfectly collateral the witness would have been admissible, yet they considered the point to which he was called as contributing to prove the forgery. (a) In a more recent case, of an indictment for forging a promissory note, it appears to have been the opinion of the judges, that the maker of the note, which purported to be payable on demand, at his own abode or at a London banker's, but was not in fact paid at either place, was a competent witness to prove that he had not made it payable at the banker's where it purported to be payable. (b) A case is reported, in which, upon an indictment for personating the proprietor of stock, and using his signature, such proprietor was admitted as a witness, to prove the amount of the stock which he had at the bank, and that the sum for which the prisoner had obtained the dividend warrant, was the exact sum due to him at the time. (c) In this case the witness was not examined to the falsity of the signature; and it seems that the facts to which he was examined might have been considered as merely collateral.

prove any other fact which is conducive [\*1503] to the general conclusion.

[\*1504]

Where the party, whose handwriting is forged, has no interest in invalidating the instrument in question, he is without doubt a competent witness. Thus, where a bank note

Where the party whose

x Evid. on Evid. 93.

y By Adams, B. in *Rex v. Geo. Bunting*, *Thetford*, March, 1767, 2 East. P. C. c. 19. s. 2. p. 298.

z Crocker's case, 1805, 2 New R. 87. 2 Leach, 387. Phil. on Evid. 93.

a Phil. on Evid. 94.

b Treble's case, 1810, 2 Taunt. 328. Leach 1040.

c Parr's case, O. B. 1787, 1 Leach 434. 2 East. P. C. c. 10. s. 65. p. 297. But he was not examined as to the falsity of the signature.



handwriting is forged, has no interest in invalidating it, he is clearly a competent witness

was forged in the name of one of the cashiers of the bank of England, he, not being personally chargeable, was holden to be a witness to prove the forgery, though he had given security for the faithful discharge of his duty. (d) And, in a case where, upon a prosecution for forging an acceptance to a bill of exchange, it appeared that, though the bankers at whose house it was made payable had, in the first instance, when they paid it, debited the account of the supposed acceptor with the payment, yet that, afterwards being satisfied of the forgery, they had given his account credit for the same sum, the supposed acceptor was admitted as a witness to prove that his name was forged. (e) So a person in whose name a receipt was forged has been admitted as a witness, having been paid the money by the debtor in fraud of whom the forgery was committed. (f) And where a man was indicted for forging a receipt, and the person whose name was forged had recovered the money from the prisoner, he was admitted as a witness to prove the forgery. (g) So where A. remitted a bill to B., and made it payable to B., for the purpose of paying the debt of A. to a third person, and not on his own account, B. never

[\*1505] \*having received the bill, and having no interest in it, was agreed to be a competent witness to prove that a forged indorsement on the back of it was not his handwriting. (h)

In several cases, the supposed testator of a forged will has been admitted as a good witness to prove the will to be a forgery, without any objection being made to the testimony. (i) And, though it is said to have been decided in one case that, on an indictment for forging a seaman's will, an executor named in a subsequent will was not a competent witness to prove the first a forgery; (k) yet it is difficult to discover any principle upon which such a decision can be supported. The will in which he was named executor, being the last will of the testator, was the only one which could have a legal operation; and the executor does not, therefore, appear to have had any interest in the question relating to the former will, by which even his credit could have been deemed to be affected. (l)

Of the removal of the objection to the

In cases where the witness appears, upon the principles which have been above-mentioned, to be interested, there is no doubt that, if he be divested of such interest by re-

d Newland's case, O. B. 1784. 1 Leach 311. 2 East. P. C. c. 19. s. 18. p. 1001.

e Usher's case, O. B. 1759, 2 East. P. C. c. 19. s. 66. p. 999. 1 Leach 48.

f Testick's case, 1774, 2 East. P. C. c. 19. s. 36. p. 925., and s. 66. p. 1000.

g By Willes, Lord C. J., in Wells's case, Bull. N. P. 289.

h Sponsonby's case, O. B. 1784, 1 Leach

332.

i Sterling's case, O. B. 1773, 1 Leach 99. Coogan's case, O. B. 1787. 1 Leach 449. 2 East. P. C. c. 19. s. 67. p. 1001.

k Rex v. Robert Rhodes, cor. Reynolds, B. O. B. 1742. 1 Leach 24.

l See 2 East. P. C. c. 19. s. 63. p. 995, 996. 1 Chit. Crim. L. 598.

lease, payment, or otherwise, at the time he is ready to be sworn, it is no objection to his competency, whatever it may be, under certain circumstances, to his credit. (m) Thus it was holden that a release from the holder of a promissory note to the supposed drawer in whose name it was \*forged, (there being no other name on the note to whom the drawer could be liable,) made him a competent witness to prove the forgery of his handwriting. (n) But a witness, by whom a bill of exchange purports to be indorsed, is not rendered competent by a release from the person to whom the bill in question had been uttered, but who had not given any value for it; for he has no interest in the bill; and the prisoner appearing to be the holder, a release from any other person would not be effectual. (o)

competen-  
cy of a  
witness by  
a release.

[\*1506]

If the party who wishes to call a witness tender a release to him, and he refuse to accept it, or the witness, having a claim, tender a release on his part, which is refused, he may be examined as a witness. (p)

Where the party whose handwriting is forged, has no such interest, and is therefore a competent witness, it seems to have been considered in some cases, that, being the best, he is the only witness, if living, to prove the forgery: but it is observed, that this is not confirmed by the current of authorities to such an extent, though the testimony of such witness, when disinterested, must doubtless be the most satisfactory of any on the question of his own handwriting. (q)

As to the  
question,  
whether  
the party  
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ing is for-  
ged, being  
competent,  
is the only  
witness to  
prove the  
forgery.

The prisoner, Captain Smith, was tried for uttering a forged receipt of one George Maughan, a butcher, at the island of Granada, upon a bill for butcher's meat, supplied to the ship of which the prisoner was captain; and the crime was effected by altering the figures in the quantity of meat, and in the sum they amounted to, with intent to charge one Trinder, the owner of the ship, with larger disbursements \*than the captain had really laid out. To prove that these alterations were forgeries, and not the hand-writing of Maughan, one Greenwood his partner was produced, as one who was acquainted with Maughan's hand: but as it did not appear that Maughan was dead, it was holden, that as he could give the best and most satisfactory evidence whether the alterations of the bill were or were not forged, no evidence but his could be admitted of the forgery, he having no degree of interest in the question, and being a competent witness to that fact. (r)

Smith's  
case. The  
person  
whose  
voucher is  
forged for  
the purpose  
[\*1507]  
of imposing  
on a third  
person,  
with whom  
he had no  
dealing,  
and to  
whom he  
could in no  
event be  
responsi-  
ble, is the

m 2 East. P. C. c. 19. s. 69. p. 1002, 1003. Dr. Dodd's case, O. B. 1777. 1 Leach 157, where the Earl of Chesterfield, the supposed obligor of the forged bond was admitted to disprove his signature, on producing a release from the supposed obligee. Taylor's case, ante, 1502.

n Akhurst's case, cor. Lord Mansfield, C. J., 1776, 1 Leach 150.

o Rex v. Young, Worcester Lent Ass. 1805. Phil. on Evid. 103.

p Goodtitle, dem. Fowler v. Welford, Doug. 139. 3 T. R. 35. Peake Evid. 174. Phil. on Evid. 104.

q 2 East. P. C. c. 19. s. 66. p. 999.

r Smith's (Captain) case, cor. Gould, J. and Yates, J. O. B. 1768. 2 East. P. C. c. 19. s. 67. p. 1000.

proper witness to prove the forgery of his own handwriting.

Hughes's case.

Holden that the handwriting of a cashier of the Bank might be disproved by any other person acquainted with it.

The evidence of the persons acquainted [\*1508] with the handwriting, considered not to be inferior or secondary.

Handwriting cannot be proved by comparison with a genuine paper. But persons of skill may be examined as to the handwriting being genuine, or an imitation, from its appearance.

But in a subsequent case of a prosecution for the forgery of a bank-note it was ruled that the handwriting of the cashier of the Bank might be disproved by any other person who was acquainted with his handwriting. (s) And in a case which was referred to the consideration of the Judges, a conviction for forging a bank-note was holden good, though there had been no testimony of the cashier at the trial to disprove his handwriting, and the forgery of the note had been proved by other evidence, which shewed that the instrument was false in all its parts, in the texture of the paper, the water mark, the engraving, the ink, and the written date of the year, which was 1798, though the printed date under the Britannia was 1799; being altogether proved to be such as the Bank never made or issued. (t)

Upon this subject an able writer upon the law of evidence observes, that the evidence of persons well acquainted with the character of the supposed writer of an instrument, for the purpose of proving or disproving the handwriting, is not in its nature inferior or secondary. He says, "though it may generally be true that a writer is best \*acquainted with his own handwriting, yet his knowledge is acquired precisely by the same means as the knowledge of other persons, who have been in the habit of seeing him write, and differs not so much in kind as in degree. The testimony of such persons, therefore, is not of an inferior or secondary species; nor does it give any reason to suspect, as in the case where primary evidence is withheld, that the fact to which they speak is not true. It is the common practice to receive such testimony in ordinary cases; and in prosecutions for capital offences it must be equally admissible." (u)

It is stated as an established rule of evidence that handwriting cannot be proved by comparing the paper in dispute with any other papers acknowledged to be genuine. (x) But in a case where the point was whether a will had been forged, and a paper, purporting to be instructions for the will, in the handwriting of the testatrix, became material, a question was put to a clerk of the post-office, who had been used to inspect franks and detect forgeries, if he could judge whether the instructions were written by the same person who was admitted to have written a certain memorandum at the bottom of the instructions, and who was suspected of having been the contriver of the will; and the question, though objected to, is said to have been allowed by the court. (y) It is, however, observed, upon this evidence, that it was a mere comparison of handwriting; and a sort of comparison the least of all to

s Hughes's case, *cor.* Le Blanc, J., *Exeter*, Spr. Ass. 1802. 2 East. P. C. c. 19. s. 68. p. 1002. And see Downes's case *post*, 1511, where a father was admitted to disprove the handwriting of his son, who was at Jamaica.

t M'Guire's case, 1801. 2 East. P. C. c.

19. s. 68. p. 1002.

u Phil. on Evid. 179.

x *Id.* *Ibid.* 428.

y Goodtitle v. Braham (trial at bar in K.B.)

4 T. R. 497.

be trusted, as it was an attempt to trace a resemblance between two papers which the writer would endeavour to make as unlike as possible. (x) In the foregoing case, the clerk of the post-office \*was also allowed to speak to the general appearance [\*1509] of the handwriting of the instructions, and to say whether, from his general knowledge of writing, the instructions were a natural, or an imitated hand; this matter being considered as a question of art, which might be answered by a witness of skill and experience. (a) The subject underwent very considerable discussion in a subsequent case; (b) from which, it is said, this distinction may properly be made, namely, that persons of skill may be called to ascertain, whether handwriting is genuine, or whether it was written at interrupted strokes, like the writing of a person attempting to imitate the hand of another: but that they cannot be asked whether the same hand which wrote another paper wrote also the feigned paper. (c)

Where the question is, whether a seal has been forged, seal engravers may be called to shew a difference between a genuine impression and that supposed to be false. (d)

With respect to the admission of his own handwriting by a party accused, a case is reported where upon an indictment against Richard Beatty and two others for a conspiracy \*to defraud, by means of a fraudulent acceptance of a bill of exchange, the indictment averred that Beatty, in pursuance of the conspiracy, *did fraudulently, &c. write his acceptance to the bill*; and no other evidence was given either of the fact of writing the acceptance, or of the handwriting of Beatty, than that of a witness, who proved that the bill, with the acceptance written upon it, was shewn to Beatty, who, being asked whether it was a good bill, answered that *it was very good*. The defendants were convicted, and a question reserved for the consideration of the Judges, whether this evidence supported the allegation in the indictment that Beatty wrote the acceptance: and all the Judges were of opinion that it was proper evidence to be left to the jury, upon which they

Of the admission of his own handwriting [\*1510] by a party accused.

<sup>a</sup> Phil. on Evid. 430. In *Cary v. Pitt*. Peake on Evid. lxxxv. upon a question being put by the counsel to a witness, whether, having been used to detect forgeries, he could say if the handwriting in question was a genuine handwriting, or otherwise, Lord Kenyon, C. J., said he could not receive such evidence; and observed that though it was received in *Revett v. Braham*, he had not, in his charge to the jury, laid any stress upon it.

<sup>c</sup> *Goodtitle v. Braham*, ante, 1508, note (y). This witness and another clerk of the post-office, who was also examined, admitted on their cross-examination, that they had never detected an imitation of the hand of a very old person who wrote with difficulty, and might be supposed frequently to stop. And

they said that their principal means of knowledge was by seeing whether the letters were *painted*, that is, gone over a second time with the pen; which, however, they admitted might happen to any person from a failure of ink.

<sup>b</sup> *Rex v. Cator, cor. Hotham, B. Maidstone* Spr. Ass. 1802. 4 Esp. 117.

<sup>c</sup> Phil. on Evid. 430. Peake on Evid. 112. In this case of *Rex v. Cator, Hotham, B.* said, "I perfectly agree with the counsel for the prosecution that there is no difference in point of evidence, whether the case be a criminal or a civil case; the same rules must apply to both."

<sup>d</sup> By Lord Mansfield, C. J. in *Folkes v. Chad*, 1783, MS. cited in Phil. on Evid. 227.

might found their verdict that Beatty wrote the acceptance. (e)

Questions as to the proof of the identity or non-existence of the person whose name is charged to be forged. Sponsonby's case. As to the proof of the identity of a payee of a bill of exchange.

Questions have frequently arisen as to the necessary proof of the identity, or non-existence, of the person whose name is charged to be forged.

In a case which has been already mentioned, in which it was holden that the payee of a bill of exchange was a competent witness under the circumstances to prove that his name indorsed thereon was a forgery, (f) it further became necessary to shew that such payee, whose name was Wm. Pearce, was the identical Wm. Pearce to whom the bill was made payable. The drawer of the bill, whose testimony was considered as the best evidence of the fact, was not produced; and the question was then raised whether a letter of advice which Pearce had received from the drawer, with whom he was intimate, signifying that such a bill had been remitted to him, and desiring him, as an act of friendship, to pay the produce to one Coles, in discharge of a debt which the drawer owed to Coles, was sufficient evidence. And Adair, Serjt. Recorder, before whom the prisoner was tried, [\*1511] held that it was not sufficient; and the testimony of Pearce to shew the handwriting to be forged was ultimately rejected, on the ground that though he might shew it not to be his own handwriting, yet it might be the handwriting of another Wm. Pearce, to whom the bill might be payable. (g) But upon this case a doubt is suggested whether the fact of Wm. Pearce being an intimate acquaintance and correspondent of the drawer, no evidence being given of the existence of any other Wm. Pearce to whom it might be supposed that the bill was made payable, was not sufficient evidence of the identity of the payee: and it is observed that under the circumstances of the case he had no interest in proving himself to be the real payee. (h)

Parr's case. Proprietor of stock examined to prove his identity.

A case has been already mentioned where, upon an indictment for personating a proprietor of stock, such proprietor was examined as a witness, to shew the amount of the stock he had at the bank; and that the sum for which the prisoner had obtained the dividend warrant was the exact sum due to him at the time; evidence which would have the effect of proving his identity. (i)

Downes's case. Where the name of the drawer and also that of

The prisoner, James Downes, was indicted for forging a bill of exchange purporting to have been drawn by one Andrew Holme, payable to the order of John Sowerby. From some letters written by the prisoner after his apprehension it clearly appeared that the name of the supposed

e Hevey, Beatty, and M'Carty (case of) O. B., 1782, East. T., 22 Geo. III. 2 East. P. C. c. 19. s. 5. p. 858. note (a). 1 Leach 232.  
f Sponsonby's case, ante 1505.  
g Sponsonby's case, cor. Adair, Serjt. Re-

corder, O. B., 1784. 1 Leach 332. 2 East. P. C. c. 19. s. 65. p. 996, 997.  
h 2 East. P. C. c. 19. s. 65. p. 997.  
i Parr's case, ante 1503. 1504.

drawer, Andrew Holme, who was the prisoner's uncle, was forged: and it also appeared from the same letters that the John Sowerby, whose indorsement was intended to be counterfeited by the prisoner, was the son of another person of the same name at Liverpool. A witness to whom the prisoner paid away the bill stated that he questioned the prisoner at the time, and that the account he gave was that the drawer of the bill, Andrew Holme, was a gentleman of \*credit at Liverpool, and the indorser a cheesemonger there, who had received the bill in payment for cheeses; and the prisoner further said that he might depend on it it was a good bill. Neither Andrew Holme, nor John Sowerby the son were called as witnesses; but John Sowerby the father was produced, and he swore that the indorsement was not his handwriting; that he had lived thirty-six years in Liverpool, and knew no other person of the same name there, either a cheesemonger or otherwise, except his son, who had left him about four months before, and afterwards carried on the same business of a cheesemonger in Dean-street. That his son had failed, and was lately gone to Jamaica. That the indorsement was not at all like his son's handwriting; and he did not believe it to be his. That the prisoner and his son were acquainted, and the prisoner had bought corks of him. Another witness also proved that the indorsement was not like the handwriting of the son, and that he did not believe it to be his. An objection was taken on behalf of the prisoner, that Andrew Holme, the drawer of the bill, ought to have been called to prove what John Sowerby it was in whose favour it was drawn; but the evidence was left by the learned Judge, who tried the prisoner, to the jury, and the prisoner was found guilty. And the point being afterwards submitted to the consideration of the twelve Judges, they were all of opinion that the conviction was proper. Buller, J., who afterwards passed sentence upon the prisoner, in adverting to the reasons upon which the opinion of the Judges proceeded, said that the objection supposed that there was a genuine drawer of the bill; whereas it was apparent, from the prisoner's own acknowledgments in his letters, that the name of the drawer, as well as that of the indorser, was forged by the prisoner: and if no real drawer existed, and the objection were allowed, it would be to excuse one forgery because another had been committed. He observed, in the second place, that the prisoner himself had ascertained who was intended by the John Sowerby whose indorsement was forged; for, when he negotiated the bill, he represented him to be a cheesemonger at \*Liverpool; and by another letter of the prisoner it was clear that he meant Sowerby the son; for thereby he requested his uncle to go to Sowerby's mother, and desire her to say nothing about it, whether he had any concern or not. or

the indorser were forged on a bill, it was holden not to be an objection that the drawer was not called to [\*1512] prove upon whom the bill was drawn, there being two of the name at the place; and that it might be shewn by other evidence who the prisoner meant by the person whose name he forged, as the payee and indorser.

[\*1513]



whether he indorsed it or not. And he concluded by saying that, it being proved that the indorsement was not the handwriting of Sowerby the son, the evidence of the forgery was full and complete, and the conviction right. (*k*)

Of the  
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Wylie's  
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[\*1514]  
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It has been already observed, that the publication of the forged instrument, with knowledge of the fact, is made a substantive offence, by most of the statutes which relate to forgery; (*m*) and in cases of this kind the knowledge of the fact, or, as it is frequently termed, the *guilty knowledge*, becomes a material part of the evidence. The subject has come under consideration in several modern cases.

Two prisoners were indicted for disposing of, and putting away a forged bank-note for one pound, *knowing the same to be forged*. It was proved that they put off the forged note stated in the indictment at the shop of one John Hind; and then, in order to shew that they knew the note to be forged, evidence was offered to prove that they had before passed other forged notes to other persons. This evidence was objected to by the counsel for the prisoners, who urged that no evidence could be given of any transaction not stated in the indictment, since the prisoners could not be prepared to defend themselves against a charge of which they had no notice. But the learned Judges, before whom the prisoners were tried, overruled the objection. Lord Ellenborough, C. J. said, "Certainly no different rule of law can prevail with respect to prosecutions by the Bank from those commenced by any other person. This point, however, is not new; it was reserved in the case of *The King v. Tattersall*, which was tried at Lancaster, in 1801, by Mr. J. Chambre, and received the collective voice of the Judges. \*The question was, whether in giving evidence to prove an allegation that the party uttered a bank-note knowing it to be forged, the prosecutor might give the conduct of the prisoner in evidence, to shew his knowledge of the forgery? The learned Judge reserved the question, whether the prisoner had not furnished pregnant evidence, and whether the jury, from his conduct on one occasion, might not infer his knowledge on another? The opinion of the Judges was, that the jury were at liberty to make such inference. The prisoner does not come unprepared; it is alleged that he uttered a note, knowing it to be forged. Are we then to exclude all evidence, but what is furnished by this particular transaction, since without other evidence it is impossible to ascertain whether the party uttered the note with knowledge, or under circumstances which shewed the uttering to be venial? I remember a case in which a person came to Manchester with

*k* Downes's case, *Lancaster Sum. Ass.* 1789, Mich. T. 1789. 2 East. P. C. c. 12. s. 65. p. 997. *m* *Ante* 1412.

a large parcel of forged notes; his whole demeanor afforded pregnant evidence of the mind and purpose for which he came; and a question was made, whether that evidence should be received; for it was said that it would be trying the prisoner for other utterings. But if crimes do so intermix, the court must go through the detail. I remember a case where a man committed three burglaries in one night; he took a shirt at one place, and left it at another; and they were all so connected that the court went through the history of the three different burglaries. The more detached in point of time the previous utterings are, the less relation they will bear to that stated in the indictment. But in such case the only question would be, whether the evidence was sufficient to warrant the inference of knowledge from such particular transactions? It would not make the evidence inadmissible. Such evidence may come out from these circumstances as to leave no doubt that the prisoners must have known what sort of paper they were passing.” (n)

\*In a subsequent case, the prisoner was also indicted for disposing of and putting away a forged bank-note, which purported to be a promissory note of the governor and company of the Bank of England, *knowing the same to be forged*. Clear proof was adduced, that the note in question was forged, and that it had been uttered by the prisoner at East Bourn, on the 17th of June 1807; so that the only remaining question was, as to his *guilty knowledge* of the forgery. To establish this, evidence was offered and admitted, that on the 20th of March preceding, he had passed off a £10. Bank of England note likewise forged, and of the same manufacture; and that there had been paid into the Bank of England various forged notes, dated between Dec. 1806, and March 1807, all of the same manufacture, and having different indorsements upon them, in the handwriting of the prisoner. It likewise appeared, that when he was apprehended he had in his possession paper and implements fit for making notes of the same kind with those produced. The prisoner was found guilty: but sentence was respited for the purpose of taking the opinion of the twelve Judges, as to the admissibility of this evidence. They were of opinion, that it was admissible to prove the knowledge of the prisoner that the note was forged; and that every thing which he said or did was proper to be admitted to shew his knowledge of the forgery (o)

[\*1515]

Ball's case. Upon a similar indictment, evidence is admissible of the prisoner having some time before uttered another forged note of the same manufacture; and also of a number of others having been in circulation which were of the same manufacture, with the prisoner's hand-writing on the back of them.

n Wylie and another (case of), *cor.* Lord Ellenborough C. J., Heath J. and Thomson, B. O. B. 1804. 1 New. R. 92. S. C. by the name of Whiley and Haines, 2. Leach 983. And see *ante*, p. 117, 118. as to the guilty know-

ledge in uttering counterfeit money; and Phil. on Evid. (3d edit.) 142, 143.

o Rex v. Ball, *Lewes Sum. Ass.* 1808. 1 Campb. 324.

Crocker's case. Evidence of another forged promissory note in the same pocket-book [\*1516] where the note was found on which the indictment proceeded. Punishment.

In another case, where the prisoner was indicted for forging a promissory note. (not a note of the bank of England,) and also for uttering it, evidence was given that, in the same pocket-book belonging to the prisoner in which the forged note was found, on which the indictment proceeded, there was also found another promissory note, for 100*l.*, payable to the prisoner or order, appearing to be signed by \*one Wm. Gapper, which Wm. Gapper proved not to be his handwriting, and that he never owed the prisoner 100*l.* This evidence of Gapper's note was objected to by the prisoner's counsel, but the Judge received the evidence. (*p*)

The punishment of forgery at common law is, as for a misdemeanor, by fine, imprisonment, and such other corporal punishment as the court, in their discretion, shall award. The punishments ordained for the offence by the statute-law, which are for the most part capital, will be mentioned, with the other enactments of the different statutes, in the succeeding chapters.

Incompetency to be a witness, &c.

A consequence of the judgment for forgery is an incapacity to be a witness until restored to competency by the king's pardon. (*q*)

Attornies convicted of forgery, &c. are to be transported for seven years.

And the statute 12 Geo. I. c. 29.. provides that, in case persons convicted of forgery shall afterwards practise as attornies, solicitors, or law-agents, the court where the suit or action is brought shall, on complaint, examine the matter in a summary way, in open court, and cause the offender to be transported for seven years. (*r*)

[\*1517]

## \* CHAPTER THE TWENTY-EIGHTH.

### *Of the Forging, Avoiding, &c. of Records and Judicial Process.*

It is clear that, by the common law, a person may be guilty of forgery by falsely and fraudulently making or altering any matter of record: for, since the law gives the highest credit to all records, it cannot but be of the utmost ill

*p* Rex v. Crocker, cor. Le Blanc, J., Salisbury Sum. Ass. 1805. 2 New R. 87, 88. *ante*, 1500, and 1503. The prisoner was convicted, and the case was submitted to the consideration of the twelve Judges; but their opinion upon this point does not appear. The prisoner was in fact pardoned, and discharged: but there were several objections to the conviction. It is, however, understood that the Judges were of opinion that the witness

was incompetent. See *ante*, 1500, note (*j*).

*q* 1 Hawk. P. C. c. 70. s. 1. 4 Black. Com. 247. 3 Bac. Ab. *Forgery*. 2 East. P. C. c. 19. s. 69. p. 1003. The corporal punishment of the pillory may not now be inflicted for this offence; 56 Geo. III. c. 138. *Ante*, 133, 211. note (*n*).

*r* Co. Lit. 66. 2 Hawk. P. C. c. 46. s. 101. Com. Dig. Testmoigne. A. 5.

consequence to the public to have them either forged or falsified. (a) If, therefore, a man, should insert in an indictment the names of those against whom in truth it was not found, it would be forgery. (b)

Even if the offence should not constitute a forgery; yet in no instance can the counterfeiting or alteration of any judicial process or matter be less than a very high misdemeanor, as tending to stop or impede the course of justice, or to encroach upon the judicial power. (c) The defacing, or rasure, of any record, without due authority, is an offence at common law, highly punishable by fine and imprisonment. (d) And it has been holden that any person making, or knowingly using, a false affidavit, taken abroad, (though a forging could not be assignable on it here, in order to mislead our own courts, and to prevent \*public justice, is punishable by indictment for a misdemeanor. (e) [\*1518]

Offences of this kind are also, in some instances, punishable by the provisions of certain statutes.

The statute 8 Hen. VI. c. 12. s. 3., enacts, "That if any record, or parcel thereof, writ, return, panel, process, or warrant of attorney, in the king's courts of chancery, exchequer, the one bench or the other, or in his treasury, be wilfully stolen, taken away, withdrawn, or avoided by any clerk, or other person, by reason whereof any judgment shall be reversed; that such stealer, taker away, withdrawer, or avoider, their procurers, counsellors, and abettors, being thereof indicted, and by process thereupon made thereof duly convicted, by their own confession, or by inquest to be taken of lawful men, whereof the one-half shall be of the men of any court of the same courts, and the other half of other, shall be adjudged for felons, and shall incur the pain of felony. And that the Judges of the said courts of the one bench or of the other, have power to hear and determine such defaults before them; and thereof to make punishment, as afore is said."

8 Hen. VI. c. 12. s. 3. Persons stealing, avoiding, &c. any record, writ, &c. whereby any judgment shall be reversed, are to be adjudged felons.

This statute extends only to the courts which are expressly named; and to the Court of Chancery, so far only as it proceeds according to the course of the common law. (f) The Justices of either bench have, by the last clause of the act, a concurrent authority, and they are to proceed who first enquire. (g) If the offence were committed in the county where the benches sit, they need no other commission; but, if

Construction of this statute.

a 1 Hawk. P. C. c. 70. s. 1, 8. 3 Bac. Ab. Forgery, (B.) Roll. Ab. 65, 76. Yelv. 146. Cro. Eliz. 178.

b Rex v. Marsh and others, 3 Mod. 66. 1 Hawk. P. C. c. 70. s. 2.

c 2 East. P. C. c. 19. s. 9. p. 866.

d 3 Inst. 71, 72. 1 Hale 646. 1 Hawk. P. C. c. 47. s. 1.

e Omealy v. Newell, 8 East. 364. And see Fawcett's case, 2 East. P. C. c. 19. s. 7. p. 862, *Ante*, 1361.

f 3 Inst. 71. 1 Hale 649.

g 3 Inst. 73. 1 Hale 651.

it were done in another county, they must have a special commission. (h)

[\*1519] \*The act, by making those who are accessories before the fact principal felons, does not mean in any way to favour those who are accessories after, but to leave them to the general construction of the law. (i)

The word *avoid* in this statute is taken in a large sense; and includes rasing, clipping, cutting off from the side, or other part of the roll, or any other kind of avoiding. (k) And it has been holden that not only any alteration of a record, whereby the judgment is *reversed*, (by which is to be understood *annulled*) but also whereby it is so made void as to be *reversible*, is within the statute; and that, whether made before or after judgment, or whether or not afterwards amended by the court. So if A. B. be outlawed by the name of A. C., and afterwards the record be altered from A. C. to A. B., this is within the statute, because the record, as it stood against A. C. is thereby annulled, and the judgment prevented which might have been given upon a writ of error for this defect: and the statute was made in advancement of justice, and to remedy the mischief. (l)

Indictment.

The indictment on this statute must lay the offence to be done *willingly* as well as feloniously. (m) But it should be observed that if the offence be committed partly in one county and partly in another, so as not to amount to a complete offence in either, the party cannot be indicted in either for a felony; (n) but only for a misdemeanor. (o) The statute particularly points out the description of the jury by whom the offence is to be tried; but the indictment may be found by a grand jury of either or any description. (p)

[\*1520] \*This statute does not extend to offences by the Judges of the courts; for it begins by expressly naming clerks, who are inferior to them. (q) But Judges are highly punishable at common law for offences of a like nature. (r) And the statute 8 Rich. II. c. 4. applies to Judges as well as to clerks.

h 1 Hale 652. 3 Inst. 73. 1 Hawk. P. C. c. 47. s. 11. In these books it is said, that if the offence be done in London, the mayor must not be named in the commission.

i 3 Inst. 72. 1 Hawk. P. C. c. 47. s. 10.

k 3 Inst. 72.

l 3 Inst. 72. 1 Hawk. P. C. c. 47. s. 8. 2 East. P. C. c. 19. s. 9. p. 866.

m 1 Hale 650. 3 Inst. 72.

n 3 Inst. 72. 1 Hawk. P. C. c. 47. s. 9. 2 East. P. C. c. 16. s. 35. p. 597.

o 1 Hawk. P. C. c. 47. s. 9. 2 East. P. C. c. 16. s. 35. p. 597.

p 1 Hale 651. 2 East. P. C. c. 16. s. 35. p. 597.

q 3 Inst. 72. 1 Hawk. P. C. c. 47. s. 5.

r 3 Inst. 72. 1 Hale 646. In 3. Inst. 72, the case of Justice *Ingham* (or *Hengham*. or

as Hawkins says, *Ingram*) who was a Judge in the reign of Edw. I. is mentioned thus: He paid eight hundred marks for a fine, for that a poore man being fined in an action of debt at thirteen shillings fourpence, the said justice, moved with pity, caused the roll to be rased, and made it six shillings eightpence. This case Justice Southcot remembered, when Catlyn, Chiefe Justice of the King's Bench, in the reign of Queen Elizabeth, would have ordered a rasure of a roll in the like case, which Southcot, one of the Judges of that court, utterly denied to assent unto, and said openly, that he meant not to build a clock-house; for (said he) with the fine that Ingham paid for the like matter, the clock-house at Westminster was builded, and furnished with a clock, which continueth to this day."

The 8 Rich. II. c. 4. enacts that "if any judge or clerk" offend by the false entering of pleas, rasing of rolls, or changing of verdicts, to the disherison of any one, he shall be punished by paying a fine to the king, and making satisfaction to the party.

8 Rich. II. c. 4. As to any Judge, &c. falsely entering pleas, &c.

By the 21 Jac. I. c. 26. s. 2. all persons who "shall acknowledge or procure to be acknowledged, any fine or fines, recovery or recoveries, deed or deeds inrolled, statute or statutes, recognizance or recognizances, bail or bails, judgment or judgments, in the name or names of any other person or persons not privy or consenting to the same," being thereof convicted or attainted, shall be adjudged felons, and suffer death without benefit of clergy. The attainder is not to work corruption of blood or loss of dower. And the act is not to extend to any judgments acknowledged by attornies of record for any persons against \*whom any such judgments shall be given. (s) A bail taken before a Judge is not a bail within this statute till it be filed of record. (t)

21 Jac. I. c. 26. s. 2. Persons acknowledging fines, bails, &c. in the name of another not privy thereto made felons without clergy. [\*1521]

The statute 52 Geo. III. c. 143. enacts "that if any person shall make, forge or counterfeit, or cause or procure to be made, forged or counterfeited, the mark or hand of the receiver of the prelines at the alienation office, upon any writ of covenant, whereby such receiver or any other person shall or may be defrauded, or suffer any loss thereby; every person so offending, and being thereof convicted, shall be adjudged guilty of felony, and shall suffer death as a felon, without benefit of clergy."

52 Geo. III. c. 143. s. 5. Any person forging, &c. the hand of the receiver of the prelines at the alienation office made guilty of felony without clergy.

## \*CHAPTER THE TWENTY-NINTH.

[\*1522]

*Of Forgeries relating to the Public Funds, and the Stocks of Public Companies. (1)*

## \*CHAPTER THE THIRTIETH.

[\*1536]

*Of Forging the Securities of the Bank of England. (2)*

s S. 3.  
t 1 Hale 696. So that the acknowledging of such bail not filed in another's name was only a misdemeanor till the statute 4 W. and M. c. 4. s. 4. which will be mentioned in a subsequent Chapter on *Falsely Personating*.

(1) This chapter being made up of recent statutes (excepting the two first) in the reign of Geo. III., is omitted.

(2) This and the three following chapters, which relate wholly to the statutes of Great Britain, are omitted.



**\*CHAPTER THE THIRTY-FIRST.**

*Of Forging the Securities of other Public Companies.*

[\*1553]

**\*CHAPTER THE THIRTY-SECOND.**

*Of Forging and Transposing Stamps.*

[\*1580]

**\*CHAPTER THE THIRTY-THIRD.**

*Of the Forgery of Official Papers, Securities, and Documents.*

[\*1615]

**\*CHAPTER THE THIRTY-FOURTH.**

*Of the Forgery of Private Papers, Securities, and Documents.*

5 Eliz. c. 14.  
s. 2. Forging deeds, charters, writings sealed, court rolls, or wills, to the intent to molest the freehold or inheritance of some person.

THE statute 5 Eliz. c. 14. s. 2. enacts, "that if any person or persons whatsoever, upon his or their own head and imagination, or by false conspiracy and fraud with others, shall wittingly, subtilly, and falsely forge or make, or subtilly cause or willingly assent to be forged or made, any false deed, charter or writing sealed, court roll, or the will of any person or persons in writing, to the intent that the state of freehold or inheritance of any person or persons, of, in or to any lands, tenements or hereditaments, freehold or copyhold, or the right, title, or interest, of any person or persons, of, in, or to the same, or any of them, shall or may be molested, troubled, defeated, recovered or charged; or shall pronounce, publish or shew forth in evidence, any such false and forged deed, charter, writing, court roll, or will, as true, knowing the same to be false and forged, as is aforesaid, to the intent above-remembered, and shall be thereof convicted, either upon action or actions of forger of false deeds, to be founded upon this statute, at the suit of the party grieved, or otherwise, according to the order and due course of the laws of this realm, or upon bill or information to be exhibited into the court of the star-chamber, according to the order and use of that court, shall pay unto the party grieved his double costs and damages, to be found or assessed in that court where such conviction shall be, and also shall be set upon the pillory (a) in some open market town, or other open \*place, and there to have both his ears cut off, and

[\*1616]

" As to this part of the punishment, see ante 211, note (n).

also his nostrils to be slit and cut, and scared with a hot iron, so as they may remain for a perpetual note or mark of his falsehood, and shall forfeit to the queen our sovereign lady, her heirs and successors, the whole issues and profits of his lands and tenements during his life, and also shall suffer and have perpetual imprisonment during his life."

The third section enacts, "that if any person or persons upon his or their own head or imagination, or by false conspiracy or fraud had with any other, shall wittingly, subtilly and falsely forge or make, or wittingly, subtilly, and falsely cause or assent to be made and forged, any false charter, deed or writing, to the intent that any person or persons shall or may have or claim any estate or interest for term of years, of, in, or to any manors, lands, tenements or hereditaments, not being copyhold, or any annuity in fee simple, fee tail or for term of life, lives or years; or after the said day shall, as is aforesaid, forge, make or cause or assent to be made or forged, any obligation or bill obligatory, or any acquittance, release or other discharge of any debt, accompt, action, suit, demand, or other things personal; or if any person or persons shall pronounce, publish, or give in evidence, any such false and forged charter, deed, writing, obligation, bill obligatory, acquittance, release, or discharge, as true, knowing the same to be false and forged, and shall be thereof convicted by any the ways and means aforesaid, that then he shall pay unto the party grieved his double costs and damages, to be found and assessed in such court where the said conviction shall be had, and shall be also set upon the pillory (*b*) in some open market town, or other open place, and there to have one of his ears cut off, and shall also have and suffer imprisonment by the space of one whole year, without bail or mainprize."

5 Eliz. c. 14. s. 3. Forging, &c. any charter, deed, or writing, to the prejudice of termors, and forging any obligation or bill obligatory, or any acquittance, release, &c.

A defendant convicted for any of these offences under the \*act, and having received corporal punishment thereupon according to the act, is not to be impeached for the same offence. (*c*) But (by section 7.) "if any person or persons being hereafter convicted or condemned of any the offences aforesaid, by any the ways or means above limited, shall after any such his or their conviction or condemnation eftsoons commit or perpetrate any of the said offences in form aforesaid, that then every such second offence or offences shall be adjudged felony;" and the parties being convicted or attainted thereof shall suffer such pains of death, forfeiture, &c. as in cases of felony without benefit of clergy. (*d*) Jurisdiction to hear and

[\*1617] Other clauses of the statute.

*b* See *ante* note (*a*).

*c* 8. 5.

*d* There must be a conviction by judgment of a first offence, before the second offence be committed, to make it felony; and the record of the first conviction must be set out in the indictment for the second offence, in order

that it may appear to be a conviction for some offence within the statute, 3 Inst. 172. 1 Hale 686. 2 East. P. C. c. 19. s. 32. p. 919. This section of the statute includes one, who, having been convicted for forging a deed, afterwards knowingly publishes the forged deed of another. *Id. Ibid.*

determine offences against the statute is given to justices of oyer and terminer, and of assize. (e) And it is provided that the act shall not extend "to any attorney, lawyer, or counselor, that shall, for his client, plead, shew forth, or give in evidence any false and forged deed, charter, will, court roll, or other writing, for true and good, being not party or privy to the forging of the same, for the pleading, shewing forth, or giving in evidence the same." (f) And also that the act shall not extend to any person or persons "that shall plead or shew forth any deed or writing exemplified under the great seal of England, or under the seal of any other authentic court of this realm; nor shall extend to any judge or justice, or other person, that shall cause any seal of any court to be set to any such deed, charter, or writing inrolled, not knowing the same to be false or forged." (g) \*There is also a similar exception as to proctors, advocates, &c. of the ecclesiastical courts. (h)

[\*1618]

Construc-  
tion.

It has been holden to be in the election of the party in the case of forging deeds to lay the indictment either at common law, or upon the statute of 5 Eliz. c. 14. (i) And as this statute appears to have been considered, some years ago, as having nearly fallen into disuse, (k) it may be deemed sufficient merely to refer in this place to the books in which the cases upon the construction of it are to be found collected. (l) In one of the latest of those cases it was holden that the statute did not mean that there should be a forged conveyance of the very lands; but if it were any deed whereby the party might be molested, it was sufficient. (m) And a variance as to the description of the lands was holden not to be material. (n)

More modern sta-  
tutes.

The more modern statutes which require to be noticed in relation to the forgery of private papers, securities, and documents, are the 2 Geo. II. c. 25. (extended to forgeries with intent to defraud any corporation by 31 G. II. c. 22. s. 78.) the 7 Geo. II. c. 22. (extended in like manner by 18 G. III. c. 18.) the 43 Geo. III. c. 139. (as to the forging of *foreign* bills of exchange, &c.) and the 45 Geo. III. c. 89. The same general rules of construction will apply equally to the same instruments named in the several statutes passed in *pari materia*; and all must necessarily be governed by the same principles of the common law. (o)

2 Geo. II. c.

[\*1619]

25 s. 1.

Forging,

The 2 Geo. II. c. 25. s. 1. enacts, "that if any person \*shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or willing-

e This does not extend to justices of the peace at their quarter sessions. See *ante* 1497.

f S. 15.

g S. 16.

h S. 12.

i Obrian's case, 2 Str. 1144.

k 2 East. P. C. c. 19. s. 33. p. 919.

l 3 Inst. Cap. LXXV. p. 168. *et sequ.* 1 Hale 682. *et sequ.* 1 Hawk. P. C. c. 70. s. 12. *et sequ.* 3 Bac. Ab. *Forgery* (C). 2 East. P. C. c. 19. s. 33. p. 919. *et sequ.*

m Crooke's case. 2 Str. 901. 2 East. P. C. c. 19. s. 33. p. 921. *Ante* 1441.

n *Id. Ibid.*

o 2 East. P. C. c. 19. s. 33. p. 920.

ly act or assist in the false making, forging or counterfeiting any deed, will, testament, bond, writing obligatory, bill of exchange, promissory note for payment of money, indorsement or assignment of any bill of exchange or promissory note for payment of money, or any acquittance or receipt, either for money or goods, with intention to defraud any person whatsoever, or shall utter or publish as true any false, forged, or counterfeited deed, will, testament, bond, writing obligatory, bill of exchange, promissory note for payment of money, indorsement, or assignment of any bill of exchange or promissory note for payment of money, acquittance or receipt, either for money or goods, with intention to defraud any person, knowing the same to be false, forged, or counterfeited;" then every such person shall be deemed guilty of felony, and suffer death as a felon, without benefit of clergy. The statute 31 Geo. II. c. 22. s. 78. reciting that doubts might arise whether the punishment, under the former statute, extended to forgeries with intent to defraud any *corporation*, supplies the supposed defect.

&c. any deed, will, bond, note, acquittance, receipt, &c. or uttering, &c. felony without clergy.

31 Geo. II. c. 22. s. 78. extends the act to *corporations*.

The statute 7 Geo. II. c. 22. enacts, "that if any person shall falsely make, alter, forge, or counterfeit, or cause, or procure to be falsely made, altered, forged, or counterfeited, or willingly act, or assist in the false making, altering, forging, or counterfeiting any acceptance of any bill of exchange, or the number or principal sum of any accountable receipt for any note, bill or other security for payment of money, or delivery of goods, with intention to defraud any person whatsoever, or shall utter or publish as true any false, altered, forged, or counterfeited acceptance of any bill of exchange, or accountable receipt for any note, bill, or other security for payment of money, or warrant or order for payment of money, or delivery of goods, with intention to defraud any person, knowing the same to be \*false, altered, forged, or counterfeited;" then every such person shall be deemed guilty of felony without benefit of clergy. The 18 Geo. III. c. 18. contains similar provisions as to such forgeries committed with intent to defraud any *corporation*.

7 Geo. II. c. 22. Forging, &c. any acceptance &c. or any warrant or order for payment of money or delivery of goods; or uttering, &c.; felony without clergy.

[\*1620] Extended to *corporations* by 18 Geo. III. c. 18.

The statute 43 Geo. III. c. 139. was passed for the prevention of the forging of *foreign* bills of exchange, promissory notes, &c. and enacts:—"that if any person shall, within any part of the united kingdom of Great Britain and Ireland, falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or knowingly aid or assist in the false making, forging, or counterfeiting, any bill of exchange, or any promissory note, undertaking, or order for the payment of money, purporting to be the bill of exchange, promissory note, undertaking, or order for the payment of money, of any foreign prince, state, or country whatsoever, or of any minister or officer entrusted by or employed in the service of any foreign prince, state, or

43 Geo. III. c. 139. s. 1. Forging, &c. *foreign* bills of exchange, notes, &c. or uttering, &c. felony punishable by transportation for fourteen years.

country, or of any person, or company of persons resident in any foreign state or country, or of any body corporate and politic, and body in the nature of a body corporate and politic, created or constituted by any foreign prince or state, with intent to deceive or defraud his majesty, his heirs, &c. or any such foreign prince, state, or country, or with intent to deceive or defraud any person or company of persons whomsoever, or any body corporate and politic, or body in the nature of a body corporate and politic whatsoever, whether the same be respectively resident, carrying on business, constituted or being in any part of the united kingdom, or in any foreign state or country, and whether such bill of exchange, promissory note, or order, be in the English language, or in any foreign language or languages, or partly in one and partly in the other: or if any person shall, within any part of the said united kingdom, tender in payment or in exchange, or otherwise utter or publish as true, any such false, forged, or counterfeited bill of exchange, [\*1621] \*promissory note, undertaking, or order, knowing the same to be false, forged, or counterfeited, with intent to deceive or defraud his majesty, his heirs, &c. or any foreign prince, state, or country, or any person or company of persons, or any body corporate and politic, or body in the nature of a body politic and corporate as aforesaid, then every person so offending shall be deemed and taken to be guilty of felony, and being thereof lawfully convicted, shall be transported for any term of years not exceeding fourteen years."

45 Geo. III. c. 89. s. 1. extends the 2 Geo. II. c. 25. and 7 G. II. c. 22. to every part of Great Britain, with certain alterations and amendments.

The statute 45 Geo. III. c. 89. s. 1. reciting that by the 2 Geo. II. c. 25. the 7 Geo. II. c. 22. and other acts certain provisions were made for the preventing and punishing the forgery of notes, bills, instruments, &c. in those acts respectively mentioned: and that it was expedient that such provisions should extend and be in force in every part of Great Britain, with such alterations and amendments therein as were thereby made, enacts, "that if any person or persons shall falsely make, forge, counterfeit, or alter, or cause or procure to be falsely made, forged, counterfeited, or altered; or willingly act or assist in the false making, forging, counterfeiting, or altering any deed, will, testament, bond, writing obligatory, bill of exchange, promissory note for payment of money, indorsement or assignment of any bill of exchange or promissory note for payment of money, acceptance of any bill of exchange, or any acquittance or receipt, either for money or goods, or any accountable receipt for any note, bill, or other security for payment of money, or any warrant, or order for payment of money or delivery of goods, with intention to defraud any person or persons, body or bodies politic or corporate whatsoever; or shall offer, dispose of, or put away, any false, forged, counterfeited, or altered deed, will, testament, bond, writing ob-

ligatory, bill of exchange, promissory note for payment of money, indorsement or assignment of any bill of exchange or promissory note for payment of money, acceptance of any bill of exchange, \*acquittance, or receipt, either for money or goods, accountable receipt for any note, bill, or other security for payment of money, warrant or order for payment of money or delivery of goods, with intention to defraud any person or persons, body or bodies politic or corporate, knowing the same to be false, forged, counterfeited or altered," then every person or persons so offending shall be deemed guilty of felony without benefit of clergy. [\*1622]

Several questions have arisen as to the written instruments which may be considered as *bills of exchange, promissory notes, indorsements, &c.*; or as *receipts*; or as *warrants or orders for the payment of money or delivery of goods*. Questions upon these statutes.

It may be first observed, that the question whether uttering in England a promissory note of a Scotch bank or chartered Scotch company payable in *Scotland* is made felony by statute, (*p*) appears to be set at rest by the 45 Geo. III. c. 89. s. 8. which enacts, that all and every the clauses and \*provisions in this act contained shall extend "to every part of Great Britain." [\*1623]

In the following case it was holden, that a promissory note for the payment of a guinea in cash or *Bank of England note* was not within the statute 2 Geo. II. c. 25.

The prisoner, Daniel Wilcock, was tried on an indictment charging him in the first count with forging, and in another count with uttering knowing it to be forged, a certain promissory note for the payment of money, the tenor of which was as follows, viz.

Wilcock's case. A promissory note for the payment of one guinea in cash or *Bank of England note* holden not to be within the statute 2 Geo. II. c. 25.

*Pontefract Bank, 1st April, 1807.*

I promise to pay the bearer one guinea on demand here in cash or Bank of England note.

No. C<sup>c</sup>. 591.

No. C<sup>c</sup>. 591.

For Perfect, Seaton, & Co.

Entd. J. U.

JOHN SEATON.

ONE GUINEA.

*p* This question was raised in Dick's case, 1 Leach 68. 2 East. P. C. c. 19. s. 35. p. 925. where the prisoner was indicted for uttering a forged Scotch bank-note, and the Judges were divided in opinion whether such a note were within the meaning of the statute 2 Geo. II. c. 25. and whether the uttering it in England were felony; the statute 2 Geo. II. c. 25. s. 4. providing that nothing in the act contained should extend to that part of Great Britain called *Scotland*. And also in M'Kay's case, O. B. 1803, MS. where the prisoner was indicted for uttering a promissory note of the British linen company at Edinburgh; and the objection was taken on his behalf, that the

instrument set out in the indictment, purporting to be an undertaking for the payment of money by a chartered Scotch company, only entitled the party to obtain payment in Scotland, and could not be put in suit in this country, and was not within the statute 2 Geo. II. c. 25. in consequence of the operation of the fourth section. Dick's case, and the opinion of the court, concerning the legality of contracts, in Robinson v. Bland, 2 Burr. 1078, were referred to; and, the point being submitted to the consideration of the twelve Judges, the prisoner was recommended for a pardon.



with intent to defraud John Garside. There were two other similar counts, charging the intent to be to defraud John Seaton, John Fox Seaton, and Richard Seaton, the bankers. The jury found the prisoner guilty of uttering the note, knowing it to be forged: but the learned Judge respite<sup>d</sup> the sentence, in order to take the opinion of the twelve Judges on the question, whether this was a note for the payment of *money* within the statute 2 Geo. II. c. 25. the guinea being by the terms of the note to be paid in cash or Bank of England note at the option of the payer. And it is understood, that the Judges were of opinion that the conviction was wrong. (*q*)

[\*1624] \*In the following case a point was made whether the instrument in question could be considered as a *bill of exchange* within 2 Geo. II. c. 25.

Chisholm's case.

A bill drawn upon the commissioners of the navy holds to be a bill of exchange, within the 2 Geo. II. c. 25. ]

The prisoner, Josiah Chisholm, was convicted for forging a certain bill of exchange in the following form.

3d Rate, Robert Gore.

Entered 13<sup>th</sup> day of *May*, 1814.

	£	s.	d
Full pay from 13 <sup>th</sup> day of May, 1814, to the 4 <sup>th</sup> day of August, 1814. }	25	4	0
Amount of deductions,	2	17	3
Net Pay	£22	6	9

Gentlemen,

8<sup>th</sup> day of *August*, 1814.

Ten days after sight,

Please to pay to Mrs. Eliz<sup>th</sup>. Coall, or order, the sum of twenty-two pounds six shillings and ninepence, being the nett personal pay due to me, as act<sup>s</sup>. Lieutenant of his majesty's ship *Zealous*, between thirteenth day of May 1814, and fourth day of August 1814; for value received.

ROBT. GORE.

Approved,

T. BOYS, Captain of H. M. S. *Zealous*.

To the Commissioners of His Majesty's Navy.

London.

with intent to defraud Elizabeth Coall widow, against the statute, &c. The second count of the indictment was for uttering, &c. with the like intention: and the third and fourth counts were similar; only laying the intention to be

*q* Wilcock's case, cor. Le Blanc. J., Yorkshire Lent Ass. 1808, MS. And see Harrison's case, 1 Leach 180. 2 East. P. C. c. 19. s. 36. p. 926. *post*. 1630, where an objection that certain counts of the indictment were not within the statutes 2 Geo. II. c. 25.

and 31 Geo. II. c. 22. s. 78. because those statutes were confined to the forgery of receipts for *money* or *goods*, whereas the counts in question charged the forgery of a receipt for *bank-notes*, which were neither *money* nor *goods*, was allowed.

\*to defraud his majesty. There were four other counts framed upon the statute 35 Geo. III. c. 94. s. 3. and 34. (r) but the counsel for the prosecution had admitted that those counts could not be supported; and they contended that the instrument was a bill of exchange within the 2 Geo. II. c. 25. It was urged, on behalf of the prisoner, that it appeared clearly, that the instrument was intended to be a bill under the 35 Geo. III. c. 94. s. 3.; that it was not drawn to be presented for acceptance or payment by the commissioners of the navy, as a bill of exchange; but in order to procure an assignment of it according to the fifteenth section of that statute; that it was not a bill of exchange, because it was not drawn on any persons bound to accept or pay it; and that the commissioners of the navy were removable at pleasure, and might be changed between the drawing and presenting of the bill. On the other hand it was contended, that the intention with which this instrument was made was not material; and that it was not necessary, to constitute a bill of exchange for this purpose, that the parties on whom it was drawn should be liable to accept, or even be existing persons; and that it was enough if the instrument purported to be drawn on a person or persons to whom it might be presented. The learned Judge respited the sentence in order that the question might be submitted to the consideration of the Judges, whether this instrument was properly described as a bill of exchange. And it is understood, that the conviction was confirmed by them, and that the prisoner afterwards received sentence of death, and was executed. (s)

One of the questions raised in a case which occurred about the same time appears to have been, whether a false assertion in an indorsement that the indorser has a procuration, without any other circumstance of falsehood or misrepresentation would make such an indorsement a forgery, within the statutes.

\*The indictment against the prisoner, George Maddocks, stated in the first count, that he had in his custody a bank bill of exchange (the tenor of which was set out) dated 1st October, 1814, for payment of £36. 19s. 0d. at 7 days' sight to Messrs. S. Brown and Co. or order, accepted on said 1st October, the date of the bill. It also stated that there were two indorsements upon the bill; the first by the said Samuel Brown and Co. to Joseph Seymour or order, and the other by the said Joseph Seymour to Robert Falcon, or order; and charged that the prisoner, having this bill so indorsed in his custody, forged another indorsement upon it as follows:

*P. Pro<sup>r</sup>. for Robert Falcon,*

GEORGE MADDOCKS.

[\*1626]  
Maddock's case.

As to the question whether a false assertion in an indorsement, that the indorser has a *procuration*, without any other circumstances of falsehood or

r *Ante*, 1593, note (h).

s Chisholm's case, *cor.* Dampier, J. *Exeter*, Spr. Ass. 1815, MS.

misrepresentation, will make such an indorsement a forgery within the statute.

with intent to defraud the Bank. against the statute, &c. The second count charged the prisoner with disposing of and putting away the forged instrument; and there were many other counts all charging the forgery to be of an indorsement. It appeared upon the evidence, that the prisoner was in the situation of a clerk and servant to the prosecutor, Mr. Robert Falcon, who was an attorney, having chambers in the Temple: that he was left in charge of the chambers, when the prosecutor went out of town, with instructions to receive any money, and make advances in the way of business, and to open any letters, and do what was necessary in case a writ or any thing of that sort was wanted; but that he had no authority from the prosecutor to indorse any bill for him by procuration. During the absence of the prosecutor, Mr. Seymour, then the holder of the bill, indorsed it to the prosecutor, and sent it in a letter to his chambers. The prisoner opened the letter, and a day or two afterwards took the bill to the Bank, and received the money; having first made the indorsement charged by the indictment to be forged. At the time he received the money he wrote a receipt immediately under the forged indorsement in the words;—Received for Robert Falcon, 4 Elm Court Temple, 5 January, 1815, Geo. Maddocks. On the following day the 6th January, the prisoner wrote to the prosecutor a sort of journal of the week's occurrences, and therein mentioned the bill in question; but only stated that he had taken it for acceptance, though he had in fact received the money the day before. On the 9th January, the prosecutor returned to town, but did not find the prisoner at his chambers, he having previously absconded. In his defence, the prisoner said that he received the money for his master's use; and did not intend to apply it otherwise; and he assigned as the cause of his absenting himself some unexpected distress in his circumstances. The case was left by the learned Judge to the jury to consider, whether, under the circumstances in evidence, it appeared to them that the prisoner meant only to receive the money for his master's use, and acted under a supposition that, in the situation of trust in which he was placed, he had a right to describe himself as acting by procuration; or whether he had made the indorsement and received the money for the purpose of defrauding his master or the Bank. The jury were of opinion that it was for the purpose of fraud, and referred to the prisoner's letter of the 6th January, wherein he only speaks of having taken the bill for acceptance, though he had actually received the money for it the day before; and they accordingly found him guilty. But as it did not appear, that the prisoner had offered to make use of the indorsement to transfer the bill to any other person, or to enable himself to receive the contents as holder, or bearer, having on the contrary given the receipt in his own name for the use of his

[\*1627]

master, whose place of residence was truly described in the receipt; a doubt arose whether the indorsement was such an assignment of the bill as is meant by the word "indorsement," in the statute. And upon this doubt the sentence was respited, in order to take the opinion of the Judges, whether the prisoner ought to have been acquitted, either on the special circumstances of his conduct, or upon the more general question, whether a false assertion in an indorsement, that the indorser has a procuration, without any other circumstance of falsehood or misrepresentation, make such \*an indorsement a forgery within the statute. The case was argued at great length before the twelve Judges: but no opinion was ever delivered; the prisoner dying in Newgate, previously to the subsequent sessions at the Old Bailey. (t)

[\*1628]

It is not necessary that a promissory note should be in itself *negotiable*, in order to make it such a note as may be the subject of an indictment for forgery, within the statute 2 Geo. II. c. 25. This was holden in a case where the prisoner had been convicted on an indictment which charged him with having forged, &c. a certain promissory note for the payment of money, which was as follows:—

Box's case. A promissory note may be a valid note within the statute 2 Geo. II. c. 25. and the subject of forgery, though not negotiable.

"On demand we promise to pay Messdames Sarah Wallis and Sarah Doubtfire, stewardesses for the time being of the Provident Daughters' Society, held at Mr. Pope's, the Hope, Smithfield, or their successors in office, sixty-four pounds, with 5 per cent. interest for the same; value received, this 7th day of February, 1815.

For Felix Calvert and Co.

£64.

JOHN FORSTER."

It was moved, in arrest of judgment, that this was no promissory note; and the case was argued before the twelve Judges. Their opinion was afterwards delivered by Le Blanc, J., to the following effect:—"An objection was taken in arrest of judgment, and argued before all the Judges, that the instrument in question, such as it is stated in the indictment, was not a promissory note within the statute, so as to be the subject of an indictment for forging, or uttering it, knowing it to be forged. The objection to this instrument was founded on this circumstance, that it appears to be made payable to two ladies, describing them as stewardesses of a provident society, or their successors in office; and that, this society not being \*enrolled according to the statute, this note was not capable to enure to their successors, and was not negotiable. The Judges are of opinion that this is, as stated on the indictment, a valid promissory note within the statute of Geo. II. It is

[\*1629]

\* Maddocks's case, Q. B. Oct. 1815, and argued before the Judges in Mich. T. 1815. MS.

not necessary that such a note should be in itself negotiable; it is sufficient that it should be a note for the certain payment of a sum of money, whether negotiable or not. And though these ladies were not at the time legally stewardesses, yet it was a description by which they were known at the time; and though they could not legally have successors in office, yet, in case of their decease, their executors and administrators might sue, and they themselves, during their life, might recover on it. Therefore, it is an instrument capable of being the subject of forgery, and there is no ground to arrest the judgment; and the judges are all of opinion that the conviction is right.” (u)

Cases as to  
“receipts.”

We may now shortly consider the questions which have arisen as to the instruments which may be considered as receipts within the statutes.

Testick's  
case.  
“Received  
the con-  
tents above,  
by me, S.  
W., &c.” is  
a sufficient  
statement  
of the re-  
ceipt in the  
indictment,  
without  
setting  
forth the  
bill of  
items to  
which it  
referred.

In a case where the prisoner was indicted for uttering a forged “receipt for money,” in the following words, “Received the contents above by me, Stephen Withers;” it appeared in evidence that he was employed by a person who kept a lottery-office, to carry out the prize-money, with an account of the deductions, and to pay it to the party, and bring back his receipt; and that the following account was delivered to him, with money to pay the balance—

No. 38,811.	Mr. WITHERS,	£.	s.	d.
One 16th of a £20. Prize,	- - - - -	1	5	0
Deduct for expences advancing and remitting				
money to you, - - - - -	- - - - -	0	1	0
		<hr/>		
		1	4	0

[\*1630]

\*That upon producing this account again, when he settled his accounts with his employer, the receipt stated in the indictment was at the bottom of it; and that he had not paid the money to Mr. Withers, whose handwriting had been forged. It was objected on behalf of the prisoner, that this receipt did not correspond with the indictment; for nothing was set forth but the receipt as for *the contents above*: and that, together with the bill of particulars, was one entire thing; and it being set forth, “which said false receipt, &c. is as follows.” the whole ought to have been set forth, and not part only, namely, “*the contents above*,” which did not appear to be the same, nor to be a receipt for money. And it was also urged after conviction, in arrest of judgment, that it did not appear by the receipt set out in the indictment that it was a receipt for money, or what it was for; and that being only for *the contents above*, and nothing set forth to shew what they were, or explain the receipt, it was unintelligible. The Judges

were of opinion that the indictment was sufficient, for it was, "*Received the contents above,*" which shewed it to be a receipt for something, though the particulars were not expressed; and it was laid to be a forged receipt for money, under the hand of Stephen Withers, for 1*l.* 4*s.*; and the bill itself was only evidence of the fact, and shewed it to be a receipt for money as charged. (x)

It has been admitted that bank-notes are not considered as money or goods, within the statute 2 Geo. II. c. 25. But it appears to have been holden, in the same case, that an entry of the receipt of money or notes made by a cashier of the Bank of England, in the bank-book of a creditor, is an accountable receipt for the payment of money within the statute 7 Geo. II. c. 22.

The indictment against the prisoner, John Harrison, contained a great number of counts: one set framed on the \*statutes 2 Geo. II. c. 25. and 31 Geo. II. c. 22. s. 78., charging the prisoner with forging and uttering a certain receipt for money, viz. "1777, June 16, Bank-notes, C. £3210," with intent respectively to defraud the Bank of England, and the London Assurance Company; the other set framed on the statute 7 Geo. II. c. 22., charging the prisoner with altering and uttering a certain accountable receipt for bank-notes for payment of money, (setting it out as before,) viz. "the said sum of 210*l.*, by prefixing the figure 3 to the said figures and cypher 210*l.*, whereby the words, &c. "1777, June 16, Bank-notes, C. £210," together with the figure 3, imported that J. C., a clerk of the Bank of England, had received bank-notes to the amount of 3210*l.* with the like intent. Upon the evidence, it appeared that the London Assurance Company, to whom the prisoner was accomptant, kept their cash with the Bank of England; for which purpose the Bank furnished the London Assurance with a book, the title of which was "Debtor, the Bank of England with the London Assurance, Creditor." On the debtor side, the clerk of the Bank, when any money or bank-note was sent to him, entered the date, and what it was that was paid in; then he signed his name, and afterwards wrote the sum, putting a bar or dash before the figures, in order to prevent another figure being prefixed or subjoined: and when the London Assurance sent for money, the cashier of the Bank wrote off so much from their bank-book; which bank-book was kept by the prisoner, as accomptant to the company, and sent by him to the Bank as occasion required. On the 16th June, 1777, the company paid into the Bank the sum of 210*l.*, which was received by a clerk of the name of John Clifford, who made an entry in the book as follows, "1777, June 16, Bank-notes, C. 210*l.*," to which sum the prisoner prefixed the figure 3, making thereby

Harrison's case. A forged receipt for bank-notes is not a receipt for money or goods, within the statute 2 Geo. II. c. 25.

[\*1631] But an entry of the receipt of money or notes, made by a cashier of the Bank of England, in the bank-book of a creditor, is an accountable receipt for the payment of money within the 7 Geo. II. c. 22.

\* Tenter's case, 1774. 2 East. P. C. c. 19 s. 36. p. 925



[\*1632] the sum received appear to have been 3210*L*. The fact of prefixing the figure, in the manner charged in the indictment, having been brought home to the prisoner, it was first objected that the case was not within the first set of counts, which were framed on the statutes 2 Geo. II. and \*31 Geo. II., those statutes being confined to receipts *for money or goods*, and this being a receipt for *bank-notes*, which were neither money nor goods; and that the legislature had so thought, by passing the stat. 7 Geo. II., in which *bills, notes, &c.* are particularly mentioned. And this objection was allowed. But the prisoner was convicted on the second set of counts, framed on the statute 7 Geo. II. c. 22.: and two points were reserved for the consideration of the Judges; first, whether the entry made by the cashier in the bank-book could be considered as an accountable receipt for the payment of money within that statute; and, secondly, that the intent to defraud a *corporation*, (the Bank of England, and the London Assurance Company, being the corporations stated in the indictment,) was not within the statute; which was confined to forgeries committed with intent to defraud any *person*. It is said that the Judges were clearly of opinion on the first point that an entry in a bank-book is an *accountable receipt* within the meaning of the act. But no opinion was publicly given; and the matter became unimportant in the particular case, as the Judges decided the second point in favour of the prisoner, and he was discharged. (*y*)

Hunter's case. The mere signing certain [\*1633] names to an assignment for payment of a sum in a navy-bill, does not, unless connected with other facts, purport on the face of the writing to be a re-

In the following case the point arose as to the necessary averments in the indictment of the instrument in question purporting to be and being a receipt, where it did not necessarily \*purport to be such on the face of it. The indictment charged that the prisoner had in his possession a certain navy-bill, (which was set forth according to its tenor and effect,) under which navy-bill there was contained a certain order in writing for payment, called an assignment, &c. and upon which there was contained a certain indorsement, partly printed and partly written, by one Wm. Davis, chief clerk to the comptroller of his majesty's navy, in his office, for bills and accounts, to the following tenor and effect; "The certificate within-mentioned is indorsed by Edward Wilson, payable to Mr. Wm. Thornton; T. Davis:" and that the prisoner forged, &c. a certain receipt for money; to wit, for the sum

*y* Harrison's case, 1777. 1 Leach 180. 2 East. P. C. c. 19. s. 36. p. 926. In the last authority the point respecting *the accountable receipt* is not reported; but it is referred to as being stated in 1 Leach: and it is observed that, in a subsequent case, (Lyon's case, 2 East. P. C. c. 19. s. 36. p. 934.) Grose, J., alluded to the ground upon which this point was decided, and said, "That in *Rex v. Harrison*, the book in which the entry was made imported to be a book containing re-

ceipts for money received by the Bank from their customers, and therefore shewed that the money was received from the party to whom the book belonged." Mr. East also observes, that it does not appear whether the opinion of the Judges upon this point was formed with reference to the manner in which the offence was laid in the indictment. The defect upon which the Judges decided in favour of the prisoner was removed by the statute 13 Geo. III. c. 18. *Ante*, 1620.

of 25*l.*, mentioned and contained in the said paper, &c. called a navy-bill, which forged receipt was as follows; that is to say, "Wm. Thornton," "Wm. Hunter;" with intention to defraud the king against the form of the statute, &c. A second count stated the navy-bill, the order for payment and indorsement, as in the first count; and then stated, that to the said last-mentioned navy-bill was annexed and written a certain false, forged, &c. receipt for money, to wit, for the sum of 25*l.*, in the said last-mentioned paper, called a navy-bill; which said false, forged, &c. receipt for money was as follows, that is to say, "Wm. Thornton," "Wm. Hunter;" and that the prisoner knowingly uttered the said last-mentioned forged, &c. receipt for money, with intent to defraud the king. Other counts, nearly similar, charged the instrument forged to be an *acquittance*; and some of the counts stated the intention to be to defraud Wm. Thornton and other persons. Upon the evidence, it appeared that Edward Wilson, who had been pilot of the Lord Mulgrave, having received from his captain a certificate of his service, sent it to Wm. Thornton, to receive his wages. That the prisoner was a clerk in the comptroller's office; and, being employed to forward the pilot's bill through the office, got into his hands the bill stated in the indictment, and carried it with the order for payment and indorsement upon it, which were necessary for receiving the money, to the cashier of the pay-office; having wafered to one side of the bill, on which was written the sum 25*l.*, under those figures, a fourpenny stamp used for receipts, on which were written the names of "Wm. Thornton," "Wm. Hunter," without any words importing that they had received the money. And it was proved that the cashier was in the habit of paying navy-bills on the owner's name being written under the sum, without any other receipt. It appeared, on producing the bill, that the name Major Woolhead was written at the bottom of it; with respect to which it was proved that it was usual to have his name to the bills, as without it they did not regularly pass through the office; but that a bill would not be stopped if his name were not put to it. There also appeared on one side of the bill the initials of Mr. Davis's name, T. D. which were not stated in the indictment. The prisoner having been convicted, judgment was respited, to take the opinion of the twelve Judges on the case; and it was argued before them that the indictment was defective upon several grounds: and, amongst others, first because it did not appear, by the tenor of the instrument as set forth therein, that it was a receipt; and, secondly, because there was nothing stated in the indictment to shew that this could operate as an *acquittance*. And judgment was arrested, on the ground that it did not appear on the face of the indictment, nor was it shewn by averment, that the instrument was a receipt. Grose, J., in delivering the opinion of the Judges, said,

receipt; and it should, therefore, be averred that the navy-bill, &c. together with the signatures, did purport to be and was a receipt.

[\*1634]

[\*1635] “That it was enough to call the signature of the two names, ‘Wm. Thornton,’ and ‘Wm. Hunter,’ a receipt, for they did not, standing by themselves, purport to be a receipt; and, therefore, the indictment should have averred that the said names, ‘Wm. Thornton,’ and ‘Wm. Hunter,’ written on the said paper, imported and signified that the said *Wm. Thornton* and *Wm. Hunter* had received the sum of twenty-five pounds mentioned in the said paper-writing. This is undoubtedly the law upon \*this subject; therefore, as the words ‘Wm. Thornton, Wm. Hunter,’ do not import to be a receipt, and there being nothing to explain the import of these words, or to shew that they were in any way intended to signify that those persons had received the money, this indictment is clearly bad on the first count; and, as the same objection applies in substance to the second count, though it is different in point of form, the majority of the Judges are of opinion that the judgment ought to be arrested.” (z)

Thompson's case. The indictment for forging the word “Settled,” at the bottom of a bill, must shew, by proper averments, that it is a receipt.

[\*1636] Upon the authority of the foregoing case, it was holden that an indictment for forging the word “settled,” at the bottom of a bill of parcels, must shew by proper averments that it is a receipt. The indictment charged that the prisoner did forge, &c. a certain receipt for money, to wit, for the sum of one pound, one shilling, and sixpence; which said false, forged, and counterfeited receipt for money, is as followeth—that is to say, “Settled, J. M.” Other counts called it an acquittance. It was objected on behalf of the prisoner, that the indictment should have shewn, by proper averments, that this was a receipt for money, according to the determination in Hunter's case. On the part of the prosecution, it was contended that it did purport to be a receipt made by a person who had a right to demand money, that the evidence proved that the right arose from the sale and delivery of goods according to the bill; and that it was sufficient if the instrument appeared upon the evidence to be of the description stated in the indictment: and Testick's \*case was cited. (a) And it was further contended that, as the stamp act, (25 Geo. III. c. 55. s. 7.) had enacted that every note, memorandum, &c. signifying or denoting any debt, account, or demand being paid, settled, &c. should be deemed and taken to be a receipt within the meaning of the act, the necessity of averring such an instrument as the present to be a receipt was taken away. But the court held, on the authority of Hunter's case, that the indictment was defective. (b)

s Hunter's case, 1794. 2 Leach 624. 3 East. P. C. c. 19. s. 36. p. 928.; and see ante, 1484. In 2 East, it is said that Buller, J., thought the second count might be supported, considering this to be as much a receipt as the writing a name was an indorsement on a bill of exchange; but to this it was answered, that an indorsement was complete by writing the name on the bill without any thing more:

whereas the name itself, as stated in the indictment, was no receipt; though the name, coupled with the navy-bill, might together form a receipt. But then it ought to be so stated.

a Ante, 1629.

b Thompson's case, cor. Thomson, B., and Graham, B. O. B., 1801. 2 Leach 910.

It has been holden that a *scrip receipt*, not filled up with the name of the subscriber or person from whom the money was received, is not a *receipt for money* within the statutes. The point came on for consideration upon demurrer; and after argument, Grose, J., delivered the opinion of the Judges; and said that the instrument, the tenor of which was necessarily set forth in the indictment, was not a *receipt* for money in contemplation of law, within the meaning of the statute 2 Geo. II. c. 25, &c. That it was the duty of the cashier appointed by the Bank to receive such subscriptions, to fill up the receipts with the names of the subscribers, or persons from whom they originally received the money; and, until the blank left in the printed form was so filled up, the instrument did not become an acknowledgment of payment: or, in other words, a *receipt* for money. While in such a state it was no more a receipt than if the sum professed to be received had been omitted. (c)

Where a person who was employed by the executors of a contractor with the navy board, to settle the account of the testator with government, produced certain forged *acquittances and receipts for money*, and delivered them to the navy board, in order to exonerate the estates of the testator from an extent, it was holden to be a forging and uttering, within the statute 2 Geo. II. c. 25. The indictment charged the prisoner with forging and uttering, knowing, &c. a great many acquittances and receipts, (which were set forth,) with intent to defraud the king. It was objected by his counsel that the case was not within the statute 2 Geo. II. c. 25., as the receipts in question purported to be receipts given to Collinridge, the contractor, by persons employed by him, for money therein stated to have been paid to them for work and materials done and provided for the business in which he was employed under the navy-board, and were produced by the prisoner as vouchers, to accompany and verify Collinridge's accounts, in order to get them passed by the navy-board; which accounts the prisoner had taken upon himself, after Collinridge's death, to get passed, in order to avoid an extent which had issued against Collinridge's estate and effects. And it was urged in support of the objection, that these workmen were solely employed by Collinridge, and not by the navy-board; and that he, and not the navy-board, were answerable to them. That, therefore, the board had nothing to do with these receipts; and it was indifferent to the board whether these sums had been paid to these several persons or not. The prisoner having been convicted, the case was submitted to the consideration of the twelve Judges, who all, (with the exception of Lawrence, J., who

Lyon's case. A *scrip receipt*, not filled up with the subscriber's name, is not a receipt for money within the statutes.

Thomas's case; holden that, were a person who was employed by the executors of a contractor with the navy board to settle the account of the testator with government, produced forged acquittances and receipts, which were in fact fabricated vouchers, in order to exonerate the estates of the testator from an extent; it was a forging and uttering, within the statute 2 Geo. II. c. 25. [\*1637]

c Lyon's case, O. B. 1793. 2 Leach 597. 2 East. P. C. c. 19. s. 36. p. 933. And see several points as to the forgery of *scrip re-*

*ceipts* discussed in Reeves's case, 2 Leach 808. *et sequ.*

was absent,) held that the conviction was right, and that the receipts, as stated, were within the statute. Grose, J., in delivering their opinion said, "The facts in the case prove that these receipts were forged; and that they purported to have been given to *Collinridge* by workmen for monies paid by him to them for work done for the commissioners of the navy-board. The persons, therefore, employed for that purpose by him, were employed not solely on his account, but on account of the king; and these receipts, if genuine, would have been legal vouchers for his account, and would have intitled him to a discharge from the navy-board. It is clear then, from the facts proved \*at the trial, and from the verdict of the jury, that these receipts are forged receipts, and that they were knowingly uttered by the prisoner with intent to defraud the king." (d)

As to the right of the prisoner to put the prosecutor to his election on an indictment stating various forgeries.

In the foregoing case a point arose, as to the right of the prisoner to put the prosecutor to his election, on an indictment stating various forgeries. The first count of the indictment charged that the prisoner uttered, &c. a certain forged acquittance and receipt for money (setting it forth,) also a certain other forged acquittance and receipt for money, (also setting it forth) and stated in like manner above twenty other receipts of different dates, for different sums, and purporting to be signed by different persons, with intent to defraud the king. And before any witnesses had been examined the counsel for the prisoner submitted to the court, whether the prosecutor ought not, under the circumstances of this case, to elect on which of the several receipts stated in the first count of the indictment he intended to proceed, and be restrained from proceeding on more than one of them; as, amidst such a variety, it would otherwise be almost impossible for the prisoner to conduct his defence. But Le Blanc, J., referred to the indictment, by which it appeared that all the receipts stated in the first count were charged to have been uttered at one and the same time; and as this single act of uttering the receipts would, if clearly proved, constitute only one offence of *uttering*, he refused the application. The proof was, that the several receipts stated in the indictment were uttered at the same time in one bundle, given by the prisoner to the solicitor of the navy-board. And when the case was submitted to the consideration of the twelve Judges, they were all of opinion that the application to put the prosecutor to his election was properly refused. (e)

Construction as to  
[\*1639]  
warrants  
or orders,  
&c.

\*It now remains to notice the cases which relate to the instruments, which may be considered as *warrants or orders for the payment of money or delivery of goods*.

*a* Thomas's case, 1800. 2 Leach 877. 2 East.P. C. c. 19. s. 36, p. 934. And see Jones and Palmer's case, *ante*. 1494. c 2 Leach 882.



It appears at one time to have been contended that the statute was confined to commercial transactions; but several cases have decided that it is not so confined. (*f*)

It has been frequently holden, that instruments which in the commercial world have peculiar denominations may yet be laid as warrants, or orders for the payment of money; if they fall within those terms, and are such in effect. So that a bill of exchange may be laid as an order for payment of money; (*g*) and in one of the cases, where this point was considered by the Judges, they were unanimously of opinion, that it was well laid; and, it was observed, that every bill of exchange seemed to be an order for the payment of money, though not *vice versa*. (*h*) And in a subsequent case, the Judges all finally concurred in opinion, that a bill of exchange, or banker's draft, was well laid in the indictment as an order for payment of money; on the ground, that though it was a bill of exchange, it was also a warrant for the payment of money; it was, if genuine, a voucher to the bankers or drawers for the payment. (*i*)

Bills of exchange, &c. may be laid as warrants, or orders for the payment of money.

\*In another case, the prisoner, James M'Intosh, was convicted of forging and uttering, knowing it to be forged, a certain order for the payment of money in the words and figures following:—

[\*1640] M'Intosh's case. Instrument considered as a bill of exchange, or order for payment of money.

“*Petersfield, 6 August, 1799.*

“Sir, Please to pay on demand to Mr. Hugh Young, or order, all my proportion of prize money, due to me for my services on board his majesty's ship *Leander*, for which this shall be your authority. Witness my hand

JOHN JOHNSON,

✂  
his mark.

To Alexr. Davison, Esq.  
No. 21, *Milbank-street, Westminster.*

Signed before us,  
Walter Noble, minister.  
John Williams, } church-  
Francs. Gibbons, } wardens.”

*f* Graham's case, O. B. 1778. 2 East. P. C. c. 19. s. 41. p. 945, M'Intosh's case, 1800. 2 East. P. C. c. 19. s. 39. p. 942.

*g* Locket's case, O. B. 1772. Trin. T. 1774. 1 Leach 94. 2 East. P. C. c. 19. s. 38. p. 940. The instrument was in the following form:—

Messrs. Neale, James, Fordyce, and Down.

Pay Mr. William Hopwood or bearer, sixteen pounds ten shillings and sixpence.  
L16. 10. 6.

R. VENNEST.

*h* Shepherd's case, O. B. 1781, Mich. T. 1781. 2 East. P. C. c. 19. s. 40. p. 944. 1 Leach 226. The instrument was as follows:—

*Green-street, 31st July, 1781.*

Sirs. Pray pay to Mr. John Atkins, or

bearer, six pounds six shillings, value received, Yours, &c.

H. TURNER.

*i* Willoughby's case, *Warwick Lent Ass.* 1783. East. T. 1783. 2 East. P. C. c. 19. s. 40. p. 944, *ante*, 1263. The instrument was in this form:—

POST BILL.

*Birmingham, 13 Feby. 1783.*

No. 6127.

Sir Wm. Lemon, Bt. & Co. Bankers, London.  
Pay 5 Gas. to Mr. Richd. Moore, or bearer on demand, value received.

ROBT. COALES.

Reced. 5 Gas.

Entd. R. Moore.



In two counts it was called an order for payment of money; and in two other counts a bill of exchange: and it was stated to have been forged and uttered, with intent to defraud John Johnson. Four other counts charged the offence to have been committed with intent to defraud Alexander Davison. One of the objections on the part of the prisoner was that this was not a bill of exchange, nor an order for payment of money within the statute 7 Geo. II. c. 22. because no sum of money was mentioned, and it was not certain that any money would be due to Johnson. The point was referred to the consideration of the Judges, who held the conviction proper. *k*

[\*1641]

The warrant or order must purport to have been made by one having authority to command payment, &c.

\*It is said, that it seems to be settled, that if the *warrant or order* mentioned in the stat. 7 Geo. II. c. 22. do not purport on the face of it, or be shewn by proper averments, to be made by one having authority to command the payment of the money or direct the delivery of the goods, and to be compulsory on the person having possession of the subject matter of it; but only purport to be a request to advance the money or supply the goods on the credit of the party applying, which the other may comply with, or not as he sees proper, it is not a warrant, or an order within the statute. (*l*)

Mitchell's case.

A note to a shopkeeper, in the name of an overseer of the poor, is not to be within the statute.

Thus it was holden, that a note in the name of an overseer of the poor to a shopkeeper, desiring him to let the prisoner have certain goods, which he would see him paid for, has been holden not to be a warrant or order for the delivery of goods within the statute. Nine of the Judges, on a conference, were clearly of opinion, that the writing was not a warrant or order for the delivery of goods within the act; considering that the words *warrant, or order*, as they stand in the act are synonymous, and import that the person giving such warrant or order has or at least claims an interest in the money or goods which are the subject matter of it, and has or at least assumes to have a disposing power over them, and takes on him to transfer the property, or at least the custody of them to the person in whose favour such warrant or order is made. And though this case must fall within the mischief: yet, in the construction of an act so penal, the strict letter of it ought not to be departed from. (*m*)

Williams's case.

A note to a tradesman requesting him to let the bearer

[\*1642]

have certain goods, &c.

So a note to a tradesman, requesting him to let the bearer have certain goods, has been holden not to be an order for the delivery of goods within the statute, it appearing that the person whose name was forged in the note, though a customer of the tradesman, was not the owner of, nor had any special interest in the goods in question, or any others in the tradesman's hands, nor had any authority to send any such order if it had been genuine. (*n*)

*k* M'Intosh's case, 1800. 2 East. P. C. c. 19. s. 39. p. 942.

*l* 2 East. P. C. c. 19. s. 37. p. 936

*m* Mitchell's case, Fost. 119. 2 East. P. C. c. 19. s. 37. p. 936.

*n* Williams's case, 1775. 1 Leach 114. 2

Upon similar grounds, it was ruled, in a recent case, by a very learned Judge, that a forged order for the purpose of obtaining a reward for the apprehension, &c. of a vagrant is not a forgery within the statute, unless it contain the requisites prescribed by the vagrant act 17 Geo. II. c. 5. s. 5. It appeared, that the order was deficient in the requisites described by that act, inasmuch as it did not purport to be under seal, and it was not directed to the high constable of the Riding: and it was contended on behalf of the prisoner, that such an instrument, supposing it to have been genuine, would have been perfectly inoperative; that it was nothing more than an order by a magistrate on the county treasurer, for the payment of a sum of money, over which the magistrate had no controul or dominion whatsoever, except by means of the statute 17 Geo. II. On the part of the prosecution, it was contended principally, that since orders in the form of the order in question had been generally drawn and acted upon in the Riding of the county in which this offence was committed, it was not essential, to bring the prisoner within the statute, that the order should comply with the requisites of the 17 Geo. II. c. 5.; and, that it was sufficient that it pursued the usual form, being thereby capable of being the instrument of fraud. But Bayley, J. said, "To bring the case within the statute, the order must be such as, on the face of it, imports to be made by a person who has a disposing power over the funds. In this case, the party looking at the act must have known that the order was not made by one who had a disposing power over the funds in his hands. The magistrate, as an individual, had no right to make such an order, and the treasurer had no right to consider it as an order which he was bound to obey. The magistrate, in his character of a justice of the peace, had no authority to make such an order; if he had any it was derived from the statute, but he had no power to make such an order as this, and if such a one had been made, the treasurer ought not to have obeyed it." (o)

Rushworth's case. A forged order, for the purpose of obtaining a reward for the apprehension of a vagrant, holden to be within the statute; it being deficient in the requisites prescribed by the statute which authorises it to be made.

[\*1643]

East. P. C. c. 19. s. 37. p. 937. The point was submitted to the consideration of the Judges, who all (De Grey, C. J. and Willis J. being absent) agreed that the case was not within the statute, feeling themselves bound by the authority of Mitchell's case, (*ante*, 1641, note (m);) but most of them said they should have doubted the propriety of that determination, if it had been *res integra*; but as it had been so long acquiesced in they thought it could not be departed from. And accordingly in a subsequent case, a note in the following form, "Messrs. Songer, please to send 10*l*. by the bearer, as I am so ill, I cannot wait on you, Eliz. Wery;" was holden not to be an order within the statute. Ellor's case, O. B. 1784. 2 East. P. C. c. 19. s. 37. p. 938. 1

Leach, 323. The prisoner was, therefore, acquitted of the felony; but detained, and at a subsequent sessions convicted of the misdemeanor. 1 Leach, 323.

o Rushworth's case, *cor.* Bayley, J., York Sum. Ass. 1816. The prisoner was accordingly acquitted upon that and another similar indictment. In Graham's case, O. B. Oct. 1778. 2 East. P. C. c. 19. s. 41. p. 945. *ante*, 1639, note (f), the prisoner was indicted for a similar offence, and an objection taken on his behalf was that the eighteenth section of the 17 Geo. II. c. 5. expressly subjects the party forging such an order to a penalty of 50*l*. which must be considered as a repeal of the statute 7 Geo. II. c. 22. as to orders of this description. And it is observed in 2 East.

It must not appear in the indictment that the person &c. had authority to make the warrant or order.

Clinch's case. Holden that it ought to have appeared in the indictment that the person whose name was subscribed to the order had an authority to make it.

\*It follows from these principles that an indictment for forging a warrant or order will be bad in form, if it appears upon the face of it, that the person whose name was subscribed to the warrant or order had no authority to make them.

An indictment which charged the prisoner with forging an order for the delivery of goods, stated that the order was subscribed by one L. D. "he, the said L. D., then and there being the *servant* of one J. L. D. in his business of a silk dyer, and purporting to be a warrant or order from the said L. D. *as such servant* of the said J. L. D. for the delivery of 8lb. of raw silk." It appeared upon the evidence that L. D., whose name was forged, was, in fact, the son of J. L. D. and was apprenticed to his father, whose business of a silk-dyer was principally conducted by him. Amongst other objections, on behalf of the prisoner, it was urged that to bring the offence within the statute the order must purport to be made by a person who had an authority, or at least claimed an interest in the subject matter of it, and who takes upon him to transfer it to the person in whose favour the order is made. That it was not averred in the indictment that L. D., whose order it purports, and is averred to be, had any authority over, or interest in, the goods in question, or any authority to make such an order, which ought to have been expressly alleged. It states that another person was the owner, namely, the father J. L. D., to whom the son was only a servant; and it cannot be inferred from that circumstance that the son had authority over the goods; and the want of such an averment cannot be supplied by parol evidence: on the contrary the order appears to have been made by an apprentice, who was not *sui juris*, and had no disposing power. The prisoner, having been convicted, the case was referred to the consideration of the Judges, who held the conviction bad. The learned Judge, who delivered their opinion, said, "that on the construction of the statute the forged warrant, or order for the delivery of the goods, must purport to be the \*order of the owner, or of some person who has, or at least claims, an interest in, or who has, or at least assumes to have a disposing power over the goods, and takes upon him to transfer the property or custody of them to the person in whose favour such order is made." And as to the form of the indictment, he said, "that it ought to

[\*1645]

(*ub. supr.*) that this objection seems to have been entitled to a different consideration from what it is stated to have received; as the prisoner was, notwithstanding, convicted, and received judgment. And a *qu.* is made, as to what became of the case. It should, however, be observed, that this eighteenth section of the 17 Geo. II. c. 5. enacts that, "in case any such *petty constable or other officer or governor or master of any house of correction*, shall counterfeit any such *certificate receipt or note*

or make or knowingly permit to be made any alteration in any such certificate receipt or note he shall forfeit the sum of fifty pounds:" and that it does not appear from the report that the prisoner, Graham, was a *petty constable or other officer, &c.* A still better answer to the objection seems to be, that the order in question was neither a *certificate, receipt, or note*, within the 18th section of the 17 Geo. II. c. 5.

have appeared in the indictment that the person, whose name was subscribed to the order, had an authority to make it; but that this could not be collected by any legal inference from the words of the indictment; for L. D., the person whose name was forged, was stated to be the *servant* of the owner, which excluded every idea that he had or could claim any interest in the goods which were the subject of the order: and that it ought to have been expressly averred that he had authority to make it." (p)

In the foregoing case it was further objected, on behalf of the prisoner, that the instrument in question was not an order, but a bare request; that it was not directed to any person, and consequently was not, upon the face of it, compulsory upon the holder of the goods; and, further, that it ought to have appeared on the face of the indictment that the order was to the holder of the goods. (q) Upon these points the learned Judge, who delivered the opinion of the Judges, said, "that the order must be directed to the holder or person interested in or having possession of the goods. That the order set forth in the indictment was not directed to any person whatsoever; but merely expressed a desire that 8lb. of silk should be delivered to the bearer of it without any direction from whom it was to be received. And that on this ground, therefore, the Judges were of opinion that this was not a warrant or order within the statute." (r)

The order must be directed to the holder or person interested in, or having possession of the goods.

\*But it should be well observed that if the order purport to be one which the party has a right to make, although in truth he had no such right, and although no such person as the order purports to be made by existed in fact, it falls with the penalty of the statute. (s)

[\*1646]

But if the order purport to be one which the party has a right to make, it will be within the act.

The prisoner, Charles Lockett, was convicted of knowingly uttering a forged order for the payment of money, in these words, "Messrs. Neale, Fordyce, and Down, pay to Wm. Hopwood or bearer 16l. 10s. 6d. Rt. Vennest," with intent to defraud one John Scoles. (t) It appeared upon the evidence that the prisoner applied to Scoles, who was a colourman, and agreed to purchase goods to the amount of 10l. 0s. 6d., which he was to send for. He went away taking with him a little Prussian blue; and afterwards came again, pretending to be in a hurry, and presented this note, which he said was a good one; and for which Scoles gave him 6l. 10s. being the difference. No such person as Rt. Vennest kept cash with Messrs. Neale and Co.; nor did it appear that there was any such man existing. Upon these facts it

Lockett's case. A forged order on a banker holden to be within the statute, though made in a fictitious name, as it purported to be made

p Clinch's case, O. B. 1791, decided by the Judges, 11th May, 1791. 2 East. P. C. c. 19. s. 37. p. 938. 2 Leach 54.

q The form of the instrument was, "Please to send by the bearer 8lb. of that whorpe huu market.

"I. Desemockex."

r Clinch's case, *Ante* note (p).

s 2 East. P. C. c. 19. s. 38. p. 940.

t The form of the order is given with some slight difference in another report. See *ante* 1639. note (g).

by a person who kept cash with such banker.

was submitted to the consideration of the Judges, whether this was an order within the statute; (u) and after very long consideration they at last agreed that it was forgery. They thought it quite immaterial whether such a man as Vennest existed or not; or if he did, whether he had kept cash at the banking house of Messrs. Neale and Co.: and that it was sufficient that the order assumed those facts, and imported a right on the part of the drawer to direct such a transfer of his property. (x)

- [\*1647]

As to the specification of the goods in the order.

Jones's case.

Order in the following form;

"Please to deliver my work to the bearer."

\*With respect to the form of the order in other respects, it appears not to be necessary that the particular goods should be therein specified, provided it be conceived in terms intelligible to the parties themselves, to whom such order is addressed.

In a case where the prisoner had been convicted of forging an order for the delivery of goods to the following purport; "Sept. 23d, 1764. Sir, please to deliver my work to the bearer,—Lydia Bell, Fleet-street, London," with intent to defraud the wardens and company of goldsmiths; and it appeared that the goods in question were articles of plate which had been sent by Mrs. Bell, a silversmith, to Goldsmiths'-hall, to be marked; and that the form of the order was the same as was usually sent upon such occasions, except that in strictness, and by the rule of the plate-office, the several sorts of work, with the weight of the silver, ought to have been mentioned in it; the Judges affirmed the conviction upon the reference to them, after a motion in arrest of judgment. But the prisoner was pardoned on condition of transportation. (y)

An order not available by reason of some collateral objection may yet be the subject of forgery.

The order will not be the less the subject of forgery, on account of its not being available by reason of some collateral objection, not appearing upon the face of it. Thus where the prisoner had been convicted for forging an order for the payment of prize-money, and it appeared that the party whose name was forged was a discharged seaman, and was, at the time the order bore date, within seven miles of the port where his wages were payable; under which circumstances his genuine order would not have been valid, by the provisions of the 32 Geo. III. c. 34. s. 2. unless made in the manner therein prescribed; the Judges held the conviction to be proper, the order itself purporting on the face of it to be made at another place beyond the limited distance. (z)

u The doubt was stated to have arisen on what was said in Mitchell's case, *ante*, 1641.

x Lockett's case, O. B. 1771, Trin. T. 1774. 1 Leach 94. 2 East. P. C. c. 19. s. 38. p. 940. S. P. in Abraham's case, 1774. 2 East. P. C. c. 19. s. 38. p. 941. The prisoners in each case received judgment of death accordingly.

y Jones's case, 1764, 1 Leach 53. 2 East. P. C. c. 19. s. 39. p. 941.

z M'Intosh's case, 1800, 2 East. P. C. c. 19. s. 39. p. 942. 2 Leach 883. *Ante* 1452. The same case is cited for another point *ante* 1640.

\*Many other points which have arisen upon indictments framed upon the statutes set forth in this Chapter, being of general application, have been already noticed in the Chapter treating generally of the subject of Forgery. (a) (1)

## \*CHAPTER THE THIRTY-FIFTH.

[\*1653]

### *Of Falsely Personating another. (2)*

THE bare fact of personating another, for the purpose of fraud, is no more than a cheat or misdemeanor at common law, and punishable as such. (a) And the principal cases in which it has been considered as indictable have been laid as cases of conspiracy. Offence at common law.

In a case where the prisoner had been acquitted on an

a *Ante* 1411, *et sequ.*

a 2 East. P. C. c. 20. s. 6. p. 1010.

(1) The residue of this Chapter, consisting of two recent statutes of Geo. III. not in force in this country, is omitted.

(2) UNITED STATES.—“If any person shall acknowledge or procure to be acknowledged in any of the courts of the United States, any recognizance, bail or judgment in the name or names of any other person or persons, not privy or consenting to the same, every such person or persons, on conviction thereof, shall be fined not exceeding five thousand dollars, or be imprisoned not exceeding seven years, and whipped not exceeding thirty nine stripes. *Provided*, nevertheless, that this act shall not extend to the acknowledgment of any judgment or judgments by any attorney or attorneys, duly admitted for any person or persons against whom any such judgment or judgments shall be had or given.”—Ing. Dig. 157.

NEW YORK.—In an action of *scire facias* against bail, the defendant pleaded that another person of the same name and description became bail, and traversed that the defendant was the same person. The plaintiff replied that the defendant and the person described in the recognizance of bail, were the same person, and issue was thereon joined. The name of *Elnathan Noble* was inserted in the bail-piece, but it was proved that *Stephen Norton* was the person who intended to be bail, and who in fact appeared before the judge who took and signed the acknowledgment of the bail-piece. It was held that this was a good plea; and that the evidence was admissible, and sufficient on the issue joined between the parties, as to the identity of the person. Where bail are personated, the court will in their discretion, on motion, order a *vacatur* of the bail; but if there has been a felonious personating of bail, the court will stay any order for relief, until the party personated has prosecuted the felon. *Renouard v Noble*. 2 Johns. Cases, 293.



indictment preferred against him for forgery, upon its appearing that he had merely passed himself off for the person whose real signature appeared on the instrument, in concert with that person: (b) he was indicted again for the misdemeanor: but it is observed that this second indictment did not turn singly on the fact of such false personating for a fraudulent purpose, but was framed against him and his associates for the conspiracy as well as the cheat. (c) And where a woman, living in the service of her master, conspired with another man that he should personate her master, and in that character should solemnize a marriage with her, which was accordingly done, for the purpose of afterwards raising a specious title to the property of the master; the gist of the indictment was for the conspiracy, and the conviction proceeded upon that ground. (d) And in a case [\*1654] \*where a cheat was effected by one person pretending to be a merchant, and another pretending to be a broker, we have seen that judgment appeared ultimately to have been given for the crown, on the ground that it was a case of conspiracy. (e) A case however is reported, in which the indictment only charged that the defendant personated a clerk to a justice of the peace, with intent to extort money from several persons, for procuring their discharge from misdemeanors for which they stood committed; and the court refused to quash it upon motion, and put the defendant to demur to it. (f) But it is observed, that it might probably have occurred to the court that this was something more than a bare endeavour to commit a fraud by means of falsely personating another: that it was an attempt to pollute and render odious the public justice of the kingdom, by making it a handle and pretence for corrupt practices. (g) How far the *refusal* to quash the indictment upon motion can be considered as an authority is questionable; as we have seen that it was the practice of the court, as often declared, not to quash on motion indictments for offences founded in fraud or oppression, though such indictments might appear not to be sustainable, but to leave the defendants to plead. (h)

Of the offence by statutes.

The offence of falsely personating another for purposes of fraud is so nearly allied to forgery, and so often blended with it, that these offences have been frequently included by the legislature in the same enactments, and made felonies

b *Ante*, 1420. *et seq.*

c 2 East. P. C. c. 20. s. 6. p. 1010. The defendants were convicted upon this second indictment.

d Robinson and Taylor, (case of,) O. B. 1746. 1 Leach 37. 2 East. P. C. c. 20. s. 6. p. 1010.

e Reg. v. Macarty and Fordenborough, *ante*, 1371, 1372.

f Dupee's case, 12 Geo. I. 2 Sess. Cas. 11. 2 East. P. C. c. 20. s. 6. p. 1010.

g 2 East. P. C. c. 20. s. 6. p. 1011.

h *Ante*, 1375. note (d).

alike subject to capital punishment. Many of the statutes, therefore, which relate to falsely personating, with a few cases determined upon their construction, have necessarily been introduced in the preceding chapters; as those concerning the personating the proprietors of public stocks, &c. (i) \*and [\*1655] the personating of seamen, &c. in order to obtain wages, prize-money, &c.; (j) and do not require to be again noticed. It remains only to mention the statutes which relate to the acknowledging of deeds, fines, bail, &c. in the name of another.

The statute 21 Jac. I. c. 26. s. 2. enacts, "That all and every person and persons which shall acknowledge or procure to be acknowledged, any fine or fines, recovery or recoveries, deed or deeds inrolled, statute or statutes, recognizance or recognizances, bail or bails, judgment or judgments, in the name or names of any other person or persons not privy or consenting to the same," shall be adjudged felons, and suffer death without benefit of clergy. The attainer is not to be any corruption of blood, nor loss of dower; and the act is not to extend to any judgment acknowledged by any attorney of record, for any person against whom any such judgment shall be had or given. (k)

21 Jac. I.  
c. 26. s. 2.  
A now-  
ledging  
any fine, re-  
covery,  
deed, sta-  
tute, bail,  
or judg-  
ment, in  
the name  
of a person  
not privy  
or consent-  
ing there-  
to, made  
felony  
without  
clergy.

In the construction of this statute it has been holden that the bare personating of bail before a Judge at chambers, or the acknowledging thereof in another name, is no felony, but only a misdemeanor, unless the bail be filed. (l) But yet it appears in one case that the offence was considered as complete by the personating; as though the bail piece was filed at Westminster, the trial was had in London, the county where the bail was personated. (m) It seems that if bail be put in under feigned names of persons who have no existence, the offender cannot be prosecuted upon this statute for felony. (n)

\*The statute 21 Jac. I. c. 26. extending only to proceedings in the courts themselves, a subsequent statute 4 W. & M. c. 4. made it felony to personate any other person as bail before any judge of assize, or commissioner appointed to take bail in the country. This statute, for the greater ease of persons in actions or suits, in the courts at Westminster, empowers the Chief Justices of the Courts of King's Bench and Common Pleas, and the Chief Baron, respectively, to- [\*1656]

4 W. & M.  
c. 4. Per-  
sonating  
bail before  
any Judge  
of assize or  
commis-  
sioner in  
the coun-

i Ante, 1522, et sequ.

j Ante, 1593, et sequ.

k S. 3.

l 1 Hale 696. Timberly's case, 2 Sid. 90.  
1 Hawk. P. C. c. 47. s. 5. 2 East. P. C. c.  
20. s. 4. p. 1009.

m Beasley's case, T. Jones 64. 1 Hawk.  
P. C. c. 47. s. 4. But in 2 East. P. C. c. 20. s.  
5. p. 1010, it is observed that according to

the report of the same case in Ventris, (1  
Vent. 301.) Twisden, J. said that it must be  
tried in Middlesex, where the bail-piece was  
filed; the entry being *venit coram domino re-*  
*ge, &c.*

n Anon. 1 Str. 384. 1 Hawk. P. C. c. 47.  
s. 6. But the court in this case ordered the  
bail and the attorney to be set in the pil-  
lory.

try, made  
felony.

gether with one other Judge of their respective courts, to appoint commissioners (other than common attorneys and solicitors) in all the counties in England and Wales, and in Berwick-upon-Tweed, to take recognizances of special bail or bail pieces in actions or suits depending in those courts. And then (by s. 4.) it is enacted, "that any person or persons who shall, before any person or persons empowered by virtue of this act, as aforesaid, to take bail or bails, represent or personate any other person or persons, whereby the person or persons so represented and personated, may be liable to the payment of any sum or sums of money for debt or damages, to be recovered in the same suit or action, wherein such person or persons are represented and personated, as if they had really acknowledged and entered into the same," being convicted thereof, shall be adjudged felons, suffer the pains of death, and incur such forfeitures and penalties as felons in other cases convicted or attainted.

27 Geo. III.  
c. 43. Per-  
sonating  
bail in  
Chester  
made felo-  
ny in like  
manner.

The statute 27 Geo. III. c. 43., which was passed for regulating the taking of special bail in actions and suits, depending in the court of great session for the county palatine of *Chester*, contains a clause (s. 4.) similar to that just set forth, by which those who personate bail before any person empowered by virtue of that act to take special bail, are made guilty of felony, and liable to the penalties, &c. of the 4 W. & M. c. 4.

[\*1657]

## CHAPTER THE THIRTY-SIXTH.

*Of Arson and the Burning of Mills, Ships, Mines, Corn, and other Property. (1)*

Offence of  
Arson at

ARSON is, at common law, an offence of the degree of felony; and has been described as *the malicious and wilful burning the*

(1) NEW YORK.—Setting fire to an *inhabited* dwelling house, by which only a part of it is consumed, is *arson* within the first section of the act, (1 N. R. L. 407. 36 Sess. Ch. 29.) and is punishable with death. It is enough if the fire is applied with a malicious and criminal intent, and *that* is as apparent as if the *whole house* had been consumed. By the addition of the word *inhabitant*, in the first section of the act, the legislature evidently intended to make a distinction between the act of burning a dwelling house while persons were actually in it, and burning an uninhabited dwelling house, the one offence being punishable with death, and the other by imprisonment. *The People v. Rose Butler*, 16 Johns. Rep. 203.

*house of another.* (a) The burning a party's own house does not come within this definition: but the burning a man's own house in a town, or so near to other houses as to create danger to them, is a great misdemeanor at common law. (b) Barns, with corn or hay within them, have been considered as so much entitled to the protection of the law, that though distant from a house, and no part of the mansion, the burning of them is felony at common law. (c)

The burning necessary to constitute arson of a house at common law must be an *actual burning* of the whole or some part of the house. Neither a bare intention, nor even an actual attempt to burn a house by putting fire into, or towards it, will amount to the offence, if no part of it be burned; but it is not necessary that any part of the house should be wholly consumed, or that the fire should have any continuance; and the offence will be complete, though the fire be put out, or go out of itself. (d)

\*The burning must also be *malicious and wilful*; otherwise it is only a trespass. No negligence or mischance, therefore, will amount to such burning. (e) And for this reason it has been holden, that if an unqualified person should, in shooting at game, happen to set fire to the thatch of a house it will not be a burning of this description. (f) And so if a man unlawfully shoot at the poultry of another: (g) but it is observed, that in such case it should seem to be understood that the party did not intend to steal the poultry, but merely

common law.

There must be an actual burning.

[\*1658] The burning must be malicious and wilful.

a 3 Inst. 66. 1 Hale 566. 1 Hawk. P. C. c. 39. 4 Black. Com. 220. 2 East. P. C. c. 21. s. 1. p. 1015.

b 1 Hale 568, 569. 1 Hawk. P. C. c. 39. s. 15. 4 Black. Com. 221. 2 East. P. C. c. 21. s. 7. p. 1027.

c 3 Inst. 67. Barham's case, 4 Co. 20. a. Sum. 86. 1 Hawk. P. C. c. 39. s. 1. 4 Black.

Com. 221.

d 3 Inst. 66. Dalt. 506. 1 Hale 568, 569. 1 Hawk. P. C. c. 39. s. 16, 17. 2 East. P. C. c. 21. s. 4. p. 1020.

e 3 Inst. 67. 4 Black. Com. 222.

f 1 Hale 569, where this is laid down contrary to the opinion of Dalt. c. 105. p. 506.

g *Id. Ibid.*

Setting fire to a gaol by a prisoner, merely for the purpose of effecting his escape, is not *arson*, nor is it wilfully burning an *inhabited dwelling house*, within the meaning of the first section of the act declaring the punishment of crimes, (1 N. R. L. 407. Sess. 36. Ch. 29,) though the *gaol* is to be deemed an inhabited dwelling house within the act. "It does not appear to have been the intention of the prisoners to burn the gaol. Their original intention was to effect their escape, and the burning was merely for that purpose. It lay on the prisoners to shew that it was no part of their intention to burn the gaol, and we think they have done it. The statute makes it felony, for a person to aid or assist a felon to escape from prison; but neither by the statute, nor the common law, is the attempt of a felon to escape, a felony. We think it would be carrying the doctrine too far to say, that setting fire to a prison by a prisoner, merely for the purpose of effecting his own escape, amounted to the crime of arson." Per Spencer, C. J. *The People v. Cottrell & al.* 18 Johns. Rep. 115. 120.

to commit a trespass: for otherwise the first intent being felonious, the party must abide all the consequences. (*h*)

The malicious and wilful burning need not correspond with the precise intent of the party.

The malicious and wilful burning effected need not correspond with the precise intent or design of the party. If A. have a malicious intent to burn the house of B. and in setting fire to it burn the house of C. also, or if the house of B. escape by some accident, and the fire take in the house of C. and burn it, this shall be said in law to be the malicious and wilful burning of the house of C. though A. did not intend to burn that house. (*i*) And accordingly it has been said, that if one man command another to burn the house of J. S. and he do so, and the fire thereof burn another house, the commander is accessory to the burning such other house. (*k*)

It may be effected by setting fire to the party's own house.

[\*1659]

And such malicious and wilful burning of the house of another may be by the means of setting fire to the party's own house; and this, though it should appear that the primary intention of the party was only to burn his own house. If \*in fact other houses were burnt, being adjoining, and in such a situation as that the fire must in all probability reach them, the intent being unlawful and malicious, and the consequences immediately and necessarily following from the original act done, the offence will be felony. (*l*) Thus where the defendant was indicted for a misdemeanor, in burning a house to his own occupation, such house being alleged to be contiguous and adjoining to certain dwelling-houses of divers liege subjects, &c.: and the facts of the case, as opened by the counsel for the prosecution, appeared to be that the defendant set fire to his own house, in order to defraud an insurance office, and that, in consequence, several houses of other persons, adjoining to his own, were burnt down: Buller, J. said, that if other persons' houses were in fact burnt, although the defendant might only have set fire to his own, yet under these circumstances the prisoner was guilty, if at all, of felony; (the misdemeanor being merged) and could not be convicted on this indictment; and, therefore, he directed an acquittal. (*m*) And in a case of a similar kind, which occurred about the same time, Grose, J. in passing sentence in the court of King's Bench, said, that if it had so happened, that any of the neighbouring houses had been set on fire in consequence of the defendant's wilful and malicious act in setting fire to his own house, (which was proved to have been done in order to cheat the insurance office,) it would clearly have amounted to a capital felony, and his life would have paid the forfeit. (*n*)

*h* 2 East. P. C. c. 21. s. 3. p. 1019. *Ante*, 660, 661.

*i* 1 Hale 569. 3 Inst. 67. 1 Hawk. P. C. c. 39. s. 19. And the indictment may charge it accordingly.

*k* Plowd. 475. 2 East. P. C. c. 21. s. 7. p. 1031

*l* 2 East. P. C. c. 21. s. 3. p. 1031. And see the case of Coke v. Woodburne, 6 St. Tri. (by Hargr.) 222.

*m* Isaac's case, cor. Buller J. 1799. 2 East. P. C. c. 21. s. 8. p. 1031.

*n* Proberts's case, B. R. Mich. 40 Geo. III. 2 East. P. C. c. 21. s. 7. p. 1031.

In order, however, to constitute the felonious offence of arson at common law, the fire must burn the house of *another*. Therefore, it has been holden not to be felony in a party to burn a house, whereof he was in possession under a \*lease for years. (o) And it was decided, that a person in possession of a copyhold dwelling-house could not be guilty of arson, by burning it, although he had a long time before surrendered it into the hands of the lord of the manor to the use of another person his heirs and assigns for securing the payment of money borrowed: for it was considered, that while the tenant continued in possession, it was his own house. (p) And upon the same principle it was decided, that a tenant in possession under an agreement for a lease for three years, from a person who held under a building lease, was not guilty of arson by burning the house. (q)

The fire must burn the house of another.

[\*1660]

But if a landlord, or reversioner, sets fire to his own house of which another is in possession, under a lease from himself, or from those whose estate he hath, it shall be accounted arson; for, during the lease, the house is the property of the tenant. (r) And it was determined, that a widow, entitled to dower, but not having it assigned, from a house, the equity of redemption of which had descended from her husband to his eldest son, for whose benefit she had let it and received the rent, was guilty of arson, by burning it while in the possession of her tenant. (s)

\*It should be observed, however, that a mere residence in a house, without any interest therein, will not prevent it from being considered as the house of *another*. As where the prisoner was a poor man, maintained by a parish, and had, some time before the commission of the crime, been put by the parish officers to live in the house which he was charged with burning, and was resident therein with his family at the time of the fact being committed, having the sole possession and occupation of it, but without payment of any rent; all the Judges held that it could not be considered as *his* house; and that he was properly convicted of the arson. (t)

[\*1661]

It will be presently seen that the questions as to the possession and ownership of the house in which the arson is committed are of less importance under the statute law; as the 43

o Holmes's case, Cro. Car. 376. W. Jones 351.

p Spalding's case, Bury Lent Ass. 1780, East. T. 1780. 1 Leach 218. 2 East. P. C. c. 21. s. 6. p. 1025.

q Breeme's case, O. B. 1780, Trin. T. 1780. 1 Leach 220. 2 East. P. C. c. 21. s. 6. p. 1026. and this and several of the preceding cases were recognised in Pedley's case, K. B. 1782. 1 Leach 242. where Lord Mansfield said that Holmes's case, (*ante*, note (o)), was confirmed to be good law; though he very much lamented that the law was so settled; and the bias of his mind was in favour of Mr. Justice

Foster's opinion in Harris's case, Fost. 115. In a case which occurred shortly afterwards, Lord Mansfield said, that "it was certainly true that it could be no felony in the defendant to burn a house of which he was in possession." Schofield's case, K. B. Hil. T. 24 Geo. III. Cald. 397. 2 East. P. C. c. 21. s. 7. p. 1028.

r Fost. 115. 4 Black. Com. 221.

s Harris's case, 1753. Fost. 113. 2 East. P. C. c. 21. s. 6. p. 1023.

t Gowen's case, 1786. 2 East. P. C. c. 21. s. 6. p. 1027. Rickman's case, *Ibid.* s. 11. p. 1031.



Geo. III. c. 58. makes the setting fire to a house, &c. *with intent to injure or defraud* any one, a capital offence, whether such house, &c. shall be in the possession of the person so setting fire thereto, or of others.

Of what is included in the term *house*.

The remaining enquiry concerning arson at common law is as to the meaning of the word *house*. And this, it may be briefly observed, extends not only to the dwelling-house, but to all out-houses, which are *parcel* thereof, though not adjoining thereto, or under the same roof: (*u*) of which kind of out-houses mention has been made in a former part of this work. (*v*) It appears that the indictment need not charge the burning to be of a *mansion* house, but only of a *house*. (*y*)

[\*1662]

Misdemeanor in burning a man's own house, when contiguous to others.

It has been already stated, that the burning a man's own house in a town, or so near to other houses as to create *\*danger* to them, though not within the definition of arson, is yet a great misdemeanor at common law. (*z*) This doctrine has been acted upon in several cases: (*a*) and, in one of the most recent, Grose, J. in pronouncing the sentence of the court of King's Bench, said, that though by a lenient construction of the law of arson this offence was holden not to be felony, yet it was a misdemeanor of great magnitude, and deserving of the most exemplary punishment. (*b*)

We may now proceed to mention the several statutes which relate to the offence of arson, and the burning of different sorts of property not the subjects of that offence at common law: and by which the discussion of many nice distinctions and doubtful questions has been rendered unnecessary.

23 H. VIII. c. 1. s. 3. Burning houses or barns with corn within them.

By the 23 Hen. VIII. c. 1. s. 3. "No person nor persons which hereafter shall happen to be found guilty, for wilful burning of any dwelling-houses or barns, wherein any grain of corn &c. shall happen to be, nor any person or persons being found guilty of any abetment procurement helping maintaining or counselling of or to such felonies shall be admitted to the benefit of clergy, &c." except persons in holy orders. This statute was extended by the 25 Hen. VIII. c. 3. s. 2. to offenders standing mute, challenging *\*above* twenty, or not answering directly. It appears to have been formerly a point of doubt and discussion, whether these statutes, which were certainly repealed as to the

*u* 3 Inst. 67. 1 Hale 570. 1 Hawk. P. C. c. 39. s. 1. Sum. 56. 4 B. & C. 221. 2 East, P. C. c. 21. s. 5. p. 1023.

*x* *Ante*, 915, *et seq.*

*y* 3 Inst. 67. Sum. 57.

*z* *Ante*, 1657.

*a* Holmes's case, Cro. Car. 576. See also the case, Cald. 397. 2 Inst. 1. C. c. 21. s. 6. p. 1023. and s. 7. p. 1023. It appears from these cases that where an indictment charges an act to have been done with a *felonious* intent, and the jury find a verdict of guilty: if the parcel, as to which the offence

is charged, but amounts in law to a misdemeanor, the court will pronounce judgment as for that offence.

*b* Prebost's case, B. R. Mich. 40 Geo. III. 2 East, P. C. c. 21. s. 7. p. 1030. The sentence pronounced was two years' imprisonment in Newgate, to stand once during that time in the pillory, and to give sureties for good behaviour for seven years from the expiration of the imprisonment.

*c* See as to the various readings of these words "grain of corn," 2 East, P. C. c. 21. s. 1. p. 1017.

ousting of clergy by the statute 1 Edw. VI. c. 12. s. 10., were revived *in toto* by the statute 5 and 6 Edw. VI. c. 10.; but subsequent statutes make such an enquiry of no importance at the present day.

The 37 Hen. VIII. c. 6. s. 4. enacts "that if any person or persons maliciously willingly and unlawfully burn or cause to be burned any wain or wains, cart or carts, laden or to be laden with coals or any other goods or merchandizes of any other person or persons, or maliciously willingly and unlawfully do burn or cause to be burned any heap or heaps of wood of any other person or persons, prepared cut and felled, or to be prepared cut or felled, for making of coals billets or talwood;" every such offender shall not only forfeit unto the party grieved treble damages, but also shall forfeit to the king for every such offence ten pounds, in name of a fine. It is observed of this statute, that the preamble seems to point to such acts done out of malice to the owner. (*d*)

37 H. VIII. c. 6. Burning any wain or cart laden with goods, or burning heaps of wood, punishable by forfeiture and fine.

The statute 4 and 5 Ph. and M. c. 4. enacts, "that all and every person and persons that shall maliciously command hire or counsel any person or persons wilfully to burn any dwelling-house or any part thereof, or any barn then having corn or grain in the same," that then every such offender or offenders being outlawed thereof, or being thereof arraigned and found guilty, or being otherwise lawfully attainted or convicted of the same offence, or being arraigned and standing mute, challenging above twenty, or not answering directly, shall not have the benefit of clergy. It was the opinion of Lord Hale, and also of Foster, J. that this statute, by taking away the benefit of clergy from the accessory before, did by necessary construction \*take it away from the principal in the like instances. (*e*)

4 & 5 Ph. and M. c. 4 takes away clergy from accessories before the fact.

The statute 43 Eliz. c. 13. s. 2. enacts, "That whosoever shall wilfully and of malice burn or cause to be burned, or aid procure or consent to the burning of any barn or stack of corn or grain," within Cumberland, Northumberland, Westmorland, or Durham, and shall be indicted and convicted, or stand mute, challenge above twenty, &c. before the justices of assize, gaol delivery, oyer and terminer, or justices of peace, &c. shall be reputed, adjudged, &c. as felons, and suffer death without benefit of clergy.

43 Eliz. c. 13. s. 2. Burning any barns, or stack of corn on the northern borders.

The 22 and 23 Car. II. c. 7. s. 2. enacts, "That when any person or persons shall in the *night-time* maliciously unlawfully and willingly burn or cause to be burnt or destroyed any ricks or stacks of corn hay or grain, barns or other houses or buildings or kilns." every such offence shall be adjudged felony. The fourth section declares,

22 & 23 Car. II. c. 7. s. 2. Persons burning any ricks or stacks of corn,

*d* 2 East. P. C. c. 21. s. 9. p. 1063.

*e* 2 Hale 347. Fost. 330 *et sequ.* 2 East.

P. C. c. 21. s. 2. p. 1017. s. 9. p. 1031.

[\*1664]

&c. barns, houses, or other buildings in the night-time, guilty of felony.

Election to be transported.

Return after transportation.

Limitation of prosecutions.

that if any person who shall be convict, or attainted of any offence hereby made felony, (to avoid judgment of death, or execution thereupon,) shall make his election to be *transported*." &c. then the justices of assize, oyer and terminer, gaol delivery, and of the peace, before whom such offender shall be convict or attaind, by virtue of this act respectively, shall cause judgment to be entered against every such offender, that he be transported beyond the seas to some of his majesty's plantations in the said judgment to be particularly mentioned and expressed, there to remain for seven years. And that if any such offender shall return into this kingdom before the expiration of the said seven years, he shall suffer death as a felon, and as if no such election to be transported had been made by him. By sect. 7. offenders under this act must be proceeded against within six months after the offence committed.

[\*1665]

1 Geo. 1. stat. 2. c. 48. s. 4. setting fire to woods, coppice, &c. felony.

\*The statute 1 Geo. 1. stat. 2. c. 48. s. 4. reciting that divers woods, underwoods, and coppices, had been theretofore lately set on fire, or burnt, to the great discouragement of planting, enacts, "That if any person or persons shall maliciously set on fire, burn or cause to be burnt, any wood, underwood or coppice, or any part thereof, such malicious setting on fire, burning or causing to be burnt," shall be felony, and the offenders shall suffer penalties and forfeitures, as other felons: and offenders in Scotland shall be punished as wilful fire-raisers, by 7 Ann. c. 21. The statute 6 Geo. 1. c. 16., and its apparent incongruity with the provisions of the statute just recited, will be noticed in a subsequent part of the work: together with the statutes which relate generally to the destroying and injuring of trees, woods, shrubs, &c. not only by burning, but by other malicious means of destruction. *f*

3 Geo. 1. c. 22. s. 1. Setting fire to any house, barn, &c.; hovel, mow, &c. of corn, &c.; or forcibly rescuing offenders, &c.; made felony without clergy.

Proceedings for bringing

The statute 3 Geo. 1. c. 22. s. 1. (commonly called the Black Act,) enacts, "That if any person or persons shall set fire to any house, barn, or out-house, or to any hovel, cock, mow, or stack of corn, straw, hay, or wood, or shall forcibly rescue any person being lawfully in custody of any officer or other person for any the offences before-mentioned: or if any person or persons shall by gift or promise of money or other reward, procure any of his majesty's subjects to join him or them in any such unlawful act: every person so offending, being thereof lawfully convicted, shall be adjudged guilty of felony, and shall suffer death as in cases of felony without benefit of clergy." The fourth section of this statute, for the more easy and speedy bringing offenders to justice, enacts, that if any person shall be charged with the said offences before two jus-

tices of peace of the county, &c. such justices shall forth-  
with certify to one of the principal secretaries of state, offenders  
who is to lay the same before the privy council, upon which to justice.  
an order in council may be made, requiring such offender to  
\*surrender within forty days; and, in case such offender [\*1666]  
shall not surrender, he shall be deemed to be attainted and  
convicted of felony without clergy; and the Court of King's  
Bench, or justices of oyer and terminer, or gaol delivery,  
may award execution, as if such offender had been convicted.  
The fifth section enacts, that persons who, after the time ap-  
pointed for such surrender is expired, shall conceal, aid, &c.  
such offenders, knowing, &c. shall be guilty of felony with-  
out clergy. The seventh and subsequent sections declare in  
what manner the hundred shall be chargeable for damages  
occasioned by such offences. The twelfth section gave a re-  
ward to persons killed or wounded in apprehending offen-  
ders. And, by the fourteenth section, for the better and  
more impartial trial of any indictment, &c. for any such of-  
fences, it is enacted "That every offence committed contrary  
to this act shall and may be enquired of, examined, tried, and  
determined, in any county in *England*, in such manner and  
form as if the fact had been therein committed." Trial in  
any coun-  
ty.

The statute 10 Geo. II. c. 32. s. 6. enacts, that during  
the continuance of the 9 Geo. I. c. 22. (g) "if any person  
or persons shall wilfully and maliciously set on fire, or  
cause to be set on fire any mine pit or delph of coal or  
cannel-coal, every person so offending," being convicted,  
shall be adjudged guilty of felony, without benefit of clergy.  
The fourth section of this statute enacts, that all the pro-  
visions of the 9 Geo. I. c. 22. for bringing offenders to jus-  
tice, and persons concealing or aiding them, and for making  
satisfaction for damages, for the encouragement of persons  
apprehending offenders, and for the better and more impar-  
tial trial of any indictment, &c. together with all restric-  
tions, limitations, and mitigations, by the said act directed,  
shall, during the continuance of that act, extend to all cases  
of offences committed by wilfully and maliciously setting on  
\*fire, or causing to be set on fire, any mine, pit, or delph of  
coal, or cannel-coal. 10 Geo. II.  
c. 32. s. 6.  
makes the  
setting on  
fire any  
mines, &c.  
of coal fel-  
ony with-  
out clergy.

The statute 9 Geo. III. c. 29. s. 2. reciting that no ef-  
fectual provision had theretofore been made for preventing  
the burning of mills, enacts, "That if any person or per-  
sons shall wilfully or maliciously burn or set fire to any  
wind saw-mill, or other windmill, or any water-mill, or other  
mill; such person so offending, being lawfully convicted  
thereof, shall be adjudged guilty of felony, without benefit  
of clergy." 9 Geo. III.  
c. 29. s. 2.  
wilfully  
burning  
mills,  
made felo-  
ny without  
clergy.

g This act of 9 Geo. I. c. 22. after several II. c. 32. made perpetual by the 31 Geo. II.  
continuances was, together with the 10 Geo. c. 12.

Section 3.  
Wilfully  
burning en-  
gines, &c.  
employe-  
in mines.

Section 4.  
Limitation  
of prosecu-  
tions.

12 Geo.  
III. c. 24.  
s. 1. wil-  
fully set-  
ting on  
fire, &c.  
ships of  
war,  
arsenals,  
&c. timber,  
&c. or  
stores of  
war, felony  
without  
clergy

[\*1668]

Trials  
by com-  
mon law,  
&c.

13 Geo.  
III. c. 67.  
s. 5. wil-  
fully set-  
ting on  
fire ships,  
&c. in  
general.

The third section of this statute makes it felony, punishable by transportation, to burn or set fire to any engines for draining water from coal mines, or for drawing coals out of the same, or for draining water from any mines of lead, &c. or to any bridges, waggon ways, &c. for conveying coals, lead, &c.; but as this section relates also to the destruction of such engines, by other means as well as by burning, it will be mentioned in a subsequent chapter. (*h*) The fourth section provides that no person shall be prosecuted by virtue of this act, for any offence committed contrary to the same, unless such prosecution be commenced within eighteen months after the offence committed.

The statute 12 Geo. III. c. 24. s. 1. enacts, "That if any person or persons shall either within this realm, or in any of the islands, countries, towns or places thereunto belonging, wilfully and maliciously set on fire, or burn, or otherwise destroy, or cause to be set on fire, or burnt or otherwise destroyed, or aid, procure, abet or assist in the setting on fire, or burning or otherwise destroying of any of his majesty's ships or vessels of war, whether the said ships or vessels of war be on float or building, or begun to be built, in any of his majesty's dock yards, or building or repairing by contract in any place or places, for the use of his majesty, or any of his majesty's arsenals, magazines, dock yards, rope yards, victualling offices, or any of the buildings erected therein, or belonging thereto; or any timber or materials there placed for building, repairing or fitting out of ships or vessels; or any of his majesty's military, naval or victualling stores, or other ammunition of war, or any place or places where any such military, naval or victualling stores, or other ammunition of war, is are or shall be kept, placed or deposited; that then the person or persons guilty of any such offence," being convicted, shall be adjudged guilty of felony, without benefit of clergy. By the second section of this act, any person who shall commit any of the offences before-mentioned out of the realm, may be indicted and tried either in any county within the realm, or in such island or place where such offence shall have been actually committed as his majesty, his heirs, &c. may deem most expedient for bringing such offender to justice.

The statute 13 Geo. III. c. 67. s. 5. relates to the offence of wilfully setting on fire ships or vessels in general, and enacts, "That if any seaman or seamen, keelman or keelmen, caster or casters, ship carpenter or ship carpenters, or other person or persons, shall wilfully and maliciously burn or set fire to any ship, keel or other vessel, every per-

son so offending, and being thereof lawfully convicted, in any court of oyer and terminer, to be holden in and for the county, shire, riding, division or district wherein the offence was committed shall be adjudged guilty of felony, without benefit of clergy." And (by s. 7.) offences committed on the high seas are made triable in any session of oyer and terminer and gaol delivery, for the trial of offences committed on the high seas, within the jurisdiction of the Admiralty of England. (i)

made felony without clergy.

Trial of offences.

By the articles of the navy, (22 Geo. II. c. 33. art. 25.) \*every person who shall unlawfully burn or set fire to any magazine or store of powder, or ship, boat, ketch, hoy, or vessel, or tackle, or furniture thereunto belonging, not appertaining to an enemy or rebel, shall be punished with death, by the sentence of a court martial.

Article of the navy. [\*1669] Burning any ship, store of powder, &c. death.

Several statutes, such as the 22 and 23 Car. II. c. 11., 1 Ann. stat. 2. c. 9., 33 Geo. III. c. 67. s. 6. and 43 Geo. III. c. 113. as they relate to the wilful destruction of ships, &c., by other means as well as by burning, will be mentioned in a subsequent chapter. (k)

The 39 Geo. III. c. 69. a public local act, for rendering more commodious and for better regulating the port of *London*, enacts, (by s. 104.) "That if any person or persons who-soever shall wilfully and maliciously set on fire any of the works to be made by virtue of this act, or any ship or other vessel lying or being in the said canal, or in any of the docks, basons, cuts or other works to be made by virtue of this act, every person so offending, in any of the said cases, shall be adjudged guilty of felony, without benefit of clergy."

39 Geo. III. c. 69, (local act,) setting fire to works, ships, &c. in the port of *London*, felony without clergy.

A recent and important statute 43 Geo. III. c. 58. s. 1. relates to the offence of wilfully setting fire to any house, barn, &c. whether in the possession of the person so setting fire to the same, or in the possession of others. It recites that certain heinous offences committed with intent, by burning, to destroy or injure the buildings and other property of his majesty's subjects, or to prejudice persons who had become insurers of or upon the same, had been of late frequently committed, and that no adequate means had been thitherto provided for the prevention and punishment of such offences: and then enacts, "that if any person or persons shall wilfully, maliciously, and unlawfully set fire to any house, barn, granary, hop-oast, malthouse, stable, coach-house, out-house, mill, warehouse, or shop, whether \*such house, barn, granary, hop-oast, malthouse, stable, coach-house, out-house, mill, warehouse, or shop, shall then be in the possession of the person or persons so setting fire to the same, or in the possession of any other person or persons, or of any body

43 Geo. III. c. 58. s. 1. Wilfully setting fire to any house, barn, &c.; whether in the possession of the person so setting fire to the same, or in the possession of others, with intent [\*1670] to injure or defraud, &c. felony without clergy.

i This act was made perpetual by 41 Geo. III. c. 19. s. 4.

k *Post*, Chap. XLIV.



corporate, with intent thereby to injure or defraud his majesty, or any of his majesty's subjects, or any body corporate, that then, and in every such case, the person or persons so offending, their counsellors, aiders, and abettors, knowing of and privy to such offence, shall be and are hereby declared to be felons, and shall suffer death as in cases of felony without benefit of clergy."

52 Geo. III.  
c. 130. s. 1.  
Wilfully  
setting fire  
to any  
buildings,  
engines,  
&c. used  
for trade,  
made felony  
without  
clergy.

The statute 52 Geo. III. c. 130. s. 1. after reciting the 9 Geo. I. c. 22. 9 Geo. III. c. 29. 43 Geo. III. c. 58. and other statutes, and that it was expedient and necessary that more effectual provisions should be made for the protection of property not within the provisions of the said acts, enacts, "that every person who shall wilfully or maliciously burn or set fire to any buildings, erections, or engines, which shall be used or employed in the carrying on, or conducting of any trade or manufactory, or any branch or department of any trade or manufactory of goods, wares, or merchandize, of any kind or description whatsoever, or in which any goods, wares, or merchandize, shall be warehoused or deposited, shall, upon being lawfully convicted thereof, be adjudged guilty of felony, without benefit of clergy."

Construc-  
tion. 22 &  
23 Car. II.  
c. 7.

Upon the construction of the statute 22 and 23 Car. II. c. 7. s. 2. (*l*) which makes it felony to burn any *ricks* or *stacks* of corn, &c. in the night time, it is said, that though this is expressed in the plural number, it never has been doubted but that the burning of *one* rick, &c. was within the statute. (*m*;

[\*1671]  
9 Geo. I.  
c. 22.

\*Upon the statute 9 Geo. I. c. 22. it is to be observed that though it is not so expressed in the statute, yet the offences there mentioned must be done *wilfully and maliciously*, for the malice makes the crime. (*n*) And it appears to have been considered that this statute did not alter the nature of the crime, or create any new offence, but only excluded the principal more clearly from his clergy. (*o*) the words "set fire to" in that statute do not, therefore, appear to admit of a larger construction than prevails by the rule of the common law; (*p*) by which, as we have seen, the putting fire into or towards a house, however maliciously, does not amount to arson, if either by accident or timely prevention no part of it be burned. (*q*) So that where the prisoner was indicted on this statute for setting fire to an outhouse, commonly called

*l* Ante, 1664.

*m* See Hassel's case, 1 Leach 5. 2 East. P. C. c. 21. s. 2. p. 1018.

*n* 2 Black. Com. 222. 2 East. P. C. c. 21. s. 3. p. 1019. And though in Allan v. The Hundred of Kirton the court held that these words were not necessary in a declaration against the hundred for damages; yet they said, "they had no doubt but the burning must be unlawful and malicious, else it might be no offence, and probably must be so ex-

pressed in an indictment for the felony." And see Minton's case, 2 East. P. C. c. 21. s. 5. p. 1021.

*o* Breeme's case, 1780, 1 Leach 220. 2 East. P. C. c. 21. s. 6. p. 1026. Clergy was previously holden to be ousted only by inference and deduction from the statute 4 and 5 Ph. & M. c. 4. See ante, 1663, 1664.

*p* 2 East. P. C. c. 21. s. 4. p. 1020.

*q* Ante, 1657.

a paper-mill, and it appeared that she had set fire to a large quantity of paper, which was drying in a loft annexed and belonging to the mill, but no part of the mill itself was consumed, the Judges thought the case not within the statute on that ground. (r) The setting fire to a *parcel* of unthreshed wheat has been holden not to be felony within this statute; and where the offence was so described in a warrant of commitment, the court of King's Bench bailed the defendant. (s)

\*A common gaol has been holden to be a house within the statute 9 Geo. I. c. 22. The indictment against the prisoner charged him in one of the counts with setting fire to the house of the corporation of *Liverpool*; in another, with setting fire to the house of one Richard Rigby; and in a third, with setting fire to the house of one Hannah Kerby. Upon the evidence it appeared that the place where the offence was committed was a gaol belonging to the corporation of *Liverpool*, which was used as the place of confinement both for criminals and debtors; that the prisoner, being confined there for debt, voluntarily set fire to his box, which was a little apartment in the prison; and that the whole gaol would, in consequence, have been probably burnt to the ground, but for timely assistance. The Richard Rigby mentioned in the indictment was the keeper of the gaol; and it appeared that his dwelling-house adjoined to the gaol, and was inhabited by himself and by Hannah Kerby, who was his mother-in-law, and who lived there by his permission, and kept it as a public-house. A wall separated the prison from the house; but the entrance into the prison was from the dwelling-house, by a door through the wall. This door was locked every night, and nobody inhabited the prison itself but the prisoners; some of whom were occasionally supplied with beds in the dwelling-house. The prisoner having been convicted, the case was submitted to the consideration of the Judges, who were of opinion that it was fully within the act; the dwelling-house being to be considered as a part of the prison, and the whole prison being the house of the corporation. (t)

In a case where the prisoner was indicted under the 9 G. I. c. 22. for setting fire to "*certain out-house*," a point was made whether the building in question answered this description. It appeared that the prosecutor kept a public-house, \*and also carried on the business of a flax-dresser; and that the building set fire to by the prisoner consisted of a stable and a chamber over it, which was used by the pro-

[\*1672]  
A common  
gaol holden  
to be a  
house with-  
in the 9  
Geo. I. c.  
22.

As to an  
"out-  
house,"  
within 9  
Geo. I. c. 22.  
[\*1673]

r Taylor's case, 1760, 1 Leach 49. 2 East. P. C. c. 21. s. 4. p. 1020. A doubt was also raised whether a mill could be considered as an *outhouse* within the meaning of the act. The case occurred before the 9 Geo. III. c. 29. (*ante*, 1667.)

s Judd's case, 2 Tr. 255.

t Donnevan's case, 1770. 2 Black. Rep. 682. 1 Leach 69. 2 East. P. C. c. 21. s. 5. p. 1020. See a precedent of an indictment at common law for setting fire to a place of confinement in a borough, 2 Stark. Crim. Plead. 422.

secutor as a shop for keeping and dressing his flax ; and that these buildings were situated in a yard at the back of the house, about four or five yards distant from it, the yard being inclosed on all sides, in one part by the house, in another part by a wall, in a third by a railing which separated it from a field, and in the remaining part by a hedge. It was objected on behalf of the prisoner, that this building was not an *out-house* within the statute 9 Geo. I. c. 22. which must be understood to mean out-houses, which in contemplation of law were not part of the dwelling-house ; and it was insisted that this was part of the dwelling-house, and that the indictment should have been for arson at common law. And the prisoner having been found guilty, the point was reserved for the opinion of the Judges who all (except Hotham, B. who was absent) agreed that the verdict was right. And it was observed, that though for some purposes this might be part of the dwelling-house ; yet still it was in fact an out-house. (t)

A school-room holden to be well described either as an out-house, or part of the dwelling-house.

[\*1674]

In a more recent case, the prisoner, Jacob Winter, was convicted upon an indictment consisting of several counts, some of which charged him with burning “ a certain out-house ” of one Thomas Rogers ; and others with burning “ a certain house ” of the said Rogers ; and some of the counts were at common law, others being laid against the form of the statute. It appeared, that the premises burnt consisted of a school-room, which was situated very near to the house in which Rogers lived, being separated from it only by a narrow passage about a yard wide. The roof of the <sup>\*</sup>house, which was of tile, reached over part of the roof of the school, which was thatched with straw : and the school with a garden and other premises, together with a court which surrounded the whole, were rented by Rogers of the parish, at a yearly rent. There was a continued fence round all the premises, and nobody but Rogers and his family had a right to come within it. Upon these facts it was urged, on behalf of the prisoner, that the building burnt was not a house nor an out-house within the statute. But the point being referred to the consideration of the twelve Judges, it is understood that they were of opinion that the building was correctly described in the indictment either as an out-house or part of the dwelling-house. (u)

Indictment upon the statute 22 and 23 Car.

In a case where the indictment was drawn upon the statute 22 & 23 Car. II. but the offence proved was not within that statute, but within the subsequent act of 9 Geo. I.

t North's case, 1795. 2 East. P. C. c. 21 s. 1. p. 1021. In the discussion before the Judges, 3 Inst. 67. was referred to, where it was laid down, that to burn a stable and the like parcel of the mansion-house is felony ; but that in the indictment it is sufficient to say de-

mun, viz. a barn, mill-house, or the like, without saying mansion-house. *Ante*, 1661.

u Winter's case, *cor.* Richards, B. *Reading* Lent Ass. 1815, and the opinion of the Judges delivered by Dallas, J. Abington Swan. Ass. 1815. MS.

c. 22. the conviction was holden proper. The indictment charged the prisoner with having feloniously and maliciously, &c. in the night-time set fire to, and burned a barn of one P. G. It appeared upon the evidence, that there was hay and corn in the barn; but it was not so stated in the indictment, which was drawn on the stat. 22 and 23 Car. II. c. 7. The Jury found the prisoner guilty of setting fire to and burning the barn, but not in the night-time. It was objected that this verdict amounted to a complete acquittal, and that no judgment could be given against the prisoner. Upon this objection the judgment was respited, and the point submitted to the consideration of the Judges, ten of whom (all that were present) held that the prisoner was properly convicted; for though the indictment laid the offence to be done *in the night-time*, which would have been necessary, to have brought the case within the stat. 22 and 23 Car. II. c. 7. yet such fact was immaterial on the stat. 9 Geo. I. c. 22. which does away any such distinction, and \*extends generally to all barns of other persons, whether having hay or corn in them, or being empty; and whether burnt in the day or night time. (x)

II. c. 7. and the offence proved within 9 Geo. I. c. 22.

[\*1675]

In the course of the trial of an indictment upon the statute 9 Geo. III. c. 29. s. 2. which relates to the burning of *mills*, it was objected that a *cotton* mill was not within the meaning of the statute: but the objection was overruled. (y)

Cotton-mill within 9 Geo. III. c. 22. s. 2.

In a late case the construction of the statute 43 Geo. III. c. 58. came under consideration. The prisoner, Wm. Farrington, was charged by the indictment with setting fire to a certain mill in the possession of Thomas Dicken, and other persons who were named, with intent to injure and defraud them, against the form of the statute. The fact of the prisoner's setting fire to the mill was clear from his own confession. But it was stated by the witnesses for the prosecution, the clerks of Messrs. Dicken and Co., that the prisoner was a harmless inoffensive man, that there never had been any quarrel or disagreement between him and his masters, or between him and any of the clerks, and that they were not aware of any motive which could have induced him to commit the act. The jury having found him guilty, sentence was respited upon a doubt whether under the particular words of the statute, 43 Geo. III. c. 58. (z) an intent to injure or defraud some person, or body corporate, was not necessary to be proved; or at least some fact, from which such intent could be inferred, beyond the mere act of setting the mill on fire. By the statute 9 Geo. III. c. 29. (a) (which makes it

Farrington's case. As to the intent to injure or defraud under the 43 Geo. 3. c. 58.

x Minton's (Susanna) case, 1786, 2 East. P. C. c. 21. s. 5. p. 1021. It seemed to be the opinion of all the Judges, that supposing it to be necessary that there should be hay or corn in the barn, it must have been so stated

in the indictment.

y Anon. *Lancaster* special session, May 1312. 2 Stark. Crim. Plead. 420.

z *Ante*, 1669, 1670.

a *Ante*, 1667.

felony without benefit of clergy wilfully or maliciously to burn or set fire to any mill), the prosecution for such offence is limited to eighteen months after the offence committed; [\*1676] \*and as the offence, which was the subject of the present indictment, was committed near three years before any prosecution commenced, it was admitted, that the indictment could only be supported, if at all, on the statute 43 Geo. III. c. 58. The opinion of the Judges was subsequently delivered by Graham, B. to the effect that burning a mill under circumstances such as appeared in this case must necessarily have been done with intention to injure; though the principal object of the statute in question was to comprize the cases of a person burning a house, mill, &c. of which he was tenant or owner, to the injury of his landlord or neighbour, or to defraud the insurers. (b)

Of the Indictment.

With respect to the indictment, it may be observed, that it is clearly necessary in an indictment for arson at common law to lay the offence to have been done *wilfully and maliciously*: (c) and though the words wilful and malicious do not occur in the statute 9 Geo. I. c. 22. yet they seem to have been considered as necessary in an indictment upon that statute. (d)

It is not necessary to allege the burning of a *dwelling-house*: the burning of a *house* only is a sufficient statement. (e) And where an indictment on the statute 9 Geo. I. c. 22. stated the burning to be of *outhouses* generally, without specifying [\*1677] their denomination, it was holden \*good. (f) And we have just seen that it is sufficient to state the burning of an *outhouse*, if it be such in fact, though, in point of law it be parcel of the dwelling-house as being within the curtilage. (g)

It is material that the ownership of the house should be correctly stated so as to shew it to be the house of *another* within the principles mentioned in an early part of this chapter. (h) But in a case where the house belonged to a parish, and the parish permitted a person to live in it who was merely a servant of the parish, and it was wholly unknown who were the trustees, or in whom the legal estate was vested, it appears to have been holden by all the Judges, that such house might have been laid to be the property of the *overseers* or persons unknown. (i) In an indictment upon the 43

b Farrington's case, *cor. Le Blanc*, J. *Staffordshire* Sum. Ass. 1811, and the opinion of the Judges delivered by Graham, B. *Staffordsh.* Lent Ass. 1812. Sentence of death was accordingly passed upon the prisoner; but he afterwards received a pardon on condition of his being imprisoned for a year, and kept to hard labour in the house of correction.

c 2 East. P. C. c. 21. s. 11. p. 1033. *Ante*, 1658. In Cox's case, 1 Leach 71 it was holden, upon an indictment for perjury at common law, that the words "falsely, maliciously, wickedly, and corruptly," implied

that the offence was committed wilfully.

d Minton's case, 2 East. P. C. c. 21. s. 5. p. 1033. And see *ante*, 1671.

e 3 Inst. 67. 1 Hale 567. Sum. 86. 1 Hawk. P. C. c. 39. s. 1. *Ante*, 1673, *non* (f.)

f Glandfield's case, 2 East. P. C. c. 21. s. 11. p. 1033, 1034.

g North's case, *ante*, 1672, 1673.

h *Ante*, 1659, *et sequ.*

i Rickman's case, 1789. 2 East. P. C. c. 21. s. 11. p. 1031.

Geo. I. c. 58. s. 1. it is as we have seen, by the words of the statute, sufficient to shew the house, &c. to be in the possession of the person setting fire to it with the injurious or fraudulent intent mentioned in the statute. (*k*) But it should seem that, even under this statute, there must be a possession coupled with an interest, and that it would not be sufficient to describe the house as in the possession of a person whose occupation was merely permissive.

It has been observed, that it requires great nicety in some cases to distinguish the person who may be said to occupy *suo jure*: (*l*) and it will be frequently advisable to state the ownership or possession differently, in different counts, in order to obviate any objection on the ground of variance. In a case where the indictment laid the whole of the premises consumed by the fire, as in the sole occupation of one B. Silk, widow, it appeared, that the premises burned, consisting \*of [\*1678] out-houses, were the property of the widow, but were only made use of by her son, who lived with her after his father's death in the dwelling-house adjoining the out-houses, and took upon him the sole management of the farm, with which these out-houses were used, to the loss and profit of which he alone stood, though without any particular agreement between him and his mother, and he paid all the servants, and purchased all the stock; but the legal property, both in the dwelling-house and farm, was in the mother, and she alone repaired the dwelling-house, and the out-houses in question; and the indictment in this form was holden to be improper. And Heath, J. held, that as to the stable, pound, and hogstyes, which the son alone used, the indictment must lay them to be in his occupation; and as to the brew-house, (another of the out-houses burned) the mother and son both occasionally paying for ingredients, the beer being used in the family, to the expences of which the mother in part contributed, though without any particular agreement as to the proportion, that the same should be laid as in their joint occupation. The prisoner was afterwards convicted on a second indictment, drawn agreeably to this opinion, and containing two counts; the first laying the occupation in the son alone, the other laying it in the mother and son; and he was executed. (*m*)

The trial in cases of arson at common law, and in most cases of burning within the statutes which have been set forth, must be had in the county where the offence is committed. But the statutes 9 Geo. I. c. 22. (*n*) 10 Geo. II. c. 32. s. 6. (*o*) 12 Geo. III. c. 24. s. 1. (*p*) and 33 Geo. III. c. 67. s. 7. (*q*) provide, as we have seen, for trials in other places. And it

*k* See the statute *ante*, 1669, 1670.

*l* 2 East. P. C. c. 21. s. 11. p. 1034.

*m* Glandfield's case, *cor.* Heath, J. *Exeter* Spr. Ass. 1791. 2 East. P. C. c. 21. s. 11. p. 1034.

*n* *Ante*, 1665, 1666.

*o* *Ante*, 1666, 1667.

*p* *Ante*, 1667, 1668.

*q* *Ante*, 1668.





12. s. 10. were revived in toto by the statute 5 and 6 Edw. VI. c. 10. or whether the principals in arson were virtually excluded by the statute 4 and 5 Ph. and M., which excluded the accessory before, it is unnecessary to consider those points, because clergy is now expressly denied to the principal in all cases within the statute 9 Geo. I. c. 22. (x) And we have seen that, in most instances, the other statutes which have been cited make the offences therein mentioned capital felonies; particularly the 43 Geo. III. c. 58. which enacts that the offenders therein mentioned, their counsellors, aiders, &c. shall be felons without benefit of clergy.

Accessories before the fact are, therefore, in some cases excluded from clergy by statutes. But accessories after the fact stand upon the same footing as in other felonies; and are not deprived of clergy by any statute, (y) except in the case of concealing, aiding, &c. an offender, who has not surrendered after an order of the king in council under the statute 9 Geo. I. c. 22. (z)

In conclusion of this chapter, it may be mentioned, that \*by the statutes 6 Ann. c. 31. s. 3. and 14 Geo. III. c. 78. s. 84. if any menial or other servant, through negligence or carelessness, shall fire, or cause to be fired, any dwelling-house, or out-house, and be convicted thereof, by oath of one witness before two justices, he shall forfeit £100. to the churchwardens, to be distributed amongst the sufferers by such fire; and if he shall not pay the same immediately, on demand of the churchwardens, he shall be committed by the justices to some work-house, or common gaol, or house of correction, for eighteen months, there to be kept to hard labour.

Penalty on  
[\*1681]  
servants  
firing any  
house or  
out-house  
through  
negligence.

## \*CHAPTER THE THIRTY-SEVENTH.

[\*1682]

### *Of Maiming and Killing Cattle. (1)*

It has been holden that no indictment lies at common law for unlawfully with force and arms maiming a horse. In a

No indict-  
ment lies

x 2 East. P. C. c. 21. s. 9. p. 1032.  
y *Id. Ibid.*

z *Ante*, 1666.

(1) TENNESSEE.—It was held in the case of the State v. Council, that on an indictment for malicious mischief, it is not necessary to prove express malice; and that the killing a horse is an indictable offence at common law. Overton's Rep. 305. 1 Dall. 335.

at common  
law for un-  
lawfully *vi*  
*et armis*  
maiming a  
horse.

case where the indictment charged that the prisoner, on, &c. with force and arms at, &c. "one black gelding of the value of 30*l.* of the goods and chattels of one William Collyer, then and there being, then and there unlawfully did maim, to the great damage of Collyer, and against the peace, &c." upon reference to the Judges after conviction, they all held that no indictable offence was stated in the indictment; that if the case were not within the black act, 9 Geo. I. c. 22. the fact itself was only a trespass; and that the words *vi et armis* did not imply force sufficient to support an indictment. (a)

37 H. VIII.  
c. 6. s. 4.  
Cutting out  
the tongue  
of any tame  
beast pun-  
ishable by  
forfeiture  
and fine.

By the 37 H. VIII. c. 6. s. 4. it was enacted, "that if any person or persons maliciously, unlawfully, and willingly cut out, or cause to be cut out, the tongue or tongues of any tame beast or beasts of any other person or persons, the said beast then being in life;" every such offender should not only forfeit to the party grieved treble damages for such offence, to be recovered by action of trespass, but should forfeit to the king for every such offence 10*l.*, in name of fine. It is observed that the preamble of this statute seems to point at such acts done out of malice to the owner. (b)

[\*1683]  
22 & 23  
Car. II. c.  
7. s. 2. Ma-  
liciously  
killing cat-  
tle in the  
night time  
made felo-  
ny.

\*The next statute in order of time is the 22 and 23 Car. II. c. 7. which reciting that whereas divers evil-disposed persons, *intending the ruin and impoverishment of their fellow-subjects*, have devised, and of late secretly in the night-time, and at other times when they think their deeds are not known, frequently practised in several parts of this kingdom unlawful and wicked courses in burning of ricks, &c. and cutting, maiming, wounding, and killing of horses, sheep, beasts, and other cattle, &c.: for prevention thereof, enacts, "that where any person or persons shall, *in the night-time*, maliciously, unlawfully, and willingly kill or destroy any horses, sheep, or other cattle of any person or persons whatsoever;" every such offence shall be adjudged felony, and the offenders and every of them shall suffer as in case of felony. The statute then makes the provisions, which have been before noticed, (c) respecting persons convicted making their election to be transported, and persons so transported and returning be-

a Ranger's case, 1798. 2 East. P. C. c. 22.  
s. 16. p. 1074.

b. *Ibid.* 1663.  
c. *Ibid.* 1654.

The malicious maiming and distiguring of cattle, is punished by particular statutes in most of the states, to which the reader is referred.

MASSACHUSETTS.—In the case of the Commonwealth v. Leach & al. 1 Mas. Rep. 58, it was unanimously held by the court, that an indictment for poisoning a cow, was within the jurisdiction of the (then) court of sessions; and the indictment, which was at common law, was held good, and the motion in arrest of judgment overruled.

Indictments at common law, for maliciously poisoning fowls, have been sustained in Massachusetts, in several cases at nisi prius which have not been reported.—Editor

fore the expiration of the term. And the fifth section enacts, "that if any person or persons shall, in the night-time, maliciously, unlawfully, and willingly maim, wound, or otherwise hurt any horses, sheep, or other cattle, *whereby the same shall not be killed, or utterly destroyed*; then every such offender shall forfeit to the party grieved treble the damage which he shall thereby sustain, to be recovered by action of trespass upon the case." By the seventh section of the statute offences are to be proceeded against within six months.

But the principal statute on this subject, at the present time, is the 9 Geo. I. c. 22. s. 1. by which "if any person or persons (whether armed or disguised, or not,) shall unlawfully and maliciously kill, maim, or wound *any cattle*; or shall forcibly rescue any person, being lawfully in custody of any officer or other person for any the offences before-mentioned; or if any person or persons shall, by gift or promise of money, or other reward, procure any of his \*majesty's subjects to join him or them in any such unlawful act; every person so offending, being lawfully convicted thereof, shall be adjudged guilty of felony without benefit of clergy." The further provisions of this statute, as to offenders being ousted of clergy for not surrendering themselves pursuant to an order of the king in council, and as to persons concealing, aiding, &c. such offenders after the time appointed for such surrender, have been mentioned in a preceding Chapter: (*d*) as also the provision (s. 14.) of the act, by which the trial of offences against it may be had in any county in *England*. (*e*)

The statute 9 Geo. I. c. 22. is considered as extending, and not as abridging, the offences described in the 22 and 23 Car. II. c. 7. In a case where the prisoner had been convicted on an indictment framed on the 9 Geo. I. c. 22. for killing a mare and a colt, it was moved in arrest of judgment; first, that the mare and colt were not averred in the indictment to be cattle within the meaning of the act; and, secondly, that the word *cattle* did not necessarily include *horses, mares, and colts*. In support of these objections, several statutes were cited, in which different sorts of animals were particularly specified, (*f*) and several others in which "horses" and "horses and mares" seemed to be contra-distinguished from and not included in the word "cattle." (*g*) But the Judges agreed unanimously that as the statute 22 and 23 Car. II. c. 7. had made the offence of killing horses by night a single felony, this statute of 9 Geo. I. c. 22. was only to be considered as an extension of that act; and some precedents of capi-

9 Geo. I. c. 22. s. 1. Killing, maiming, or wounding any cattle, made felony without clergy. [\*1684]

Construction of the statutes. The statute 9 Geo. I. c. 22. is considered as extending the offences in the 22 & 23 Car. II. c. 7. and therefore horses, mares, and colts, are included in the word "cattle."

*d* Ante, 1665, 1666.

*e* Ibid.

*f* 3 & 4 Ed. VI. c. 19. 5 & 6 Ed. VI. c. 14. and 31 Geo. II. c. 40. for regulating the sale of cattle.

*g* 12 Car. II. c. 4. (book of rates) 22 Car.

II. c. 13. 14 Geo. II. c. 6. 15 Geo. II. c. 34. But see the observation in 2 East. P. C. c. 22. s. 18. p. 1075 that the argument from the statutes 14 and 15 Geo. II. will lose much of its force from adverting to the preamble of the first of those statutes.

[\*1685]

tal convictions were cited upon this branch of the statute, though none of executions. It was, therefore, agreed that judgment of death should be given \*against the prisoner at the next assizes. (h) This point has received a similar determination in subsequent cases. (i) And it is observed that it is plain that the legislature must have intended to include *horses* in the word "*cattle*," when in the statute of Car. II. they speak of "*horses, sheep, or other cattle*;" and by the statute of George the First they exclude from clergy such as kill, &c., *any cattle*: which latter statutes was evidently intended to enlarge, and not to restrain, the description of the felony. (k)

The 9 Geo. I. c. 22. extends to the maiming or wounding of cattle, though not mortal; and to a wounding, though no permanent injury be inflicted.

The statute 9 Geo. I. c. 22. extends to such as *maim or wound* any cattle though not destroyed, which, by the 22 and 23 Car. II. c. 7. was left a misdemeanor at most, punishable only by action to recover treble damages. And it has been holden that under the statute 9 Geo. I. c. 22. the maiming or wounding need not be mortal: and that the wounding need not even be such as to cause a permanent injury. Thus, upon an indictment which charged the prisoner, in one count, with maiming, and in another with wounding a gelding; and, upon proof that he had maliciously, and with an intent to injure the prosecutor, driven a nail into the frog of the horse's foot, whereby the horse was rendered useless to the owner, and continued so at the time of the trial, but was stated to be likely to do well, and to be perfectly sound again in a short time, judgment was respited, after conviction, upon a doubt whether, as the horse was likely to recover, and as the wound was not a permanent injury, the offence was within the statute: but the Judges held the conviction right; and considered the word "*wound*" in the statute 9 Geo. I. to be used as contradistinguished from a permanent injury, such as maiming. (l)

[\*1686]

In cases within 9 Geo. I. c. 22. there must be *malice* against the owner of the cattle.

Pearce's case.  
Malice

\*It is settled by many decisions that in order to bring a case within this statute of 9 Geo. I. c. 22. there must be malice directed against the owner of the cattle, and not merely against the animal itself.

In one of these cases where the prisoner was indicted for maiming and wounding a cow, it appeared in evidence, that he had attempted to commit bestiality with the cow, and, because she would not stand quiet, had in a passionate manner run a sharp-pointed stick quite through her body; upon which the learned Judge before whom the prisoner was

*h* Paty's case, *Abingdon Sum. Ass.* 1770. 2 Black. Rep. 721. 1 Leach 72. 2 East. P. C. c. 22. s. 18. p. 1074. At the next assizes the prisoner was reprieved for transportation; and afterwards (upon a strong application from the country) he received a free pardon.

*i* Mot's case, O. B. 1783. 1 Leach 73. note, (a). Mayle's case, *cor.* Buller, J., *Bodmin Sum. Ass.* 1791. 2 East. P. C. c. 22. s. 18. p. 1076.

*k* 2 East. P. C. c. 22. s. 18. p. 1076.

*l* Haywood's case, 1801. 2 East. P. C. c. 22. s. 20. p. 1076

tried directed an acquittal, considering it to be necessary to shew that the maiming of the animal was done from some malicious motive towards the *owner* of it, and not merely from an angry and passionate disposition towards the beast itself, without any intention of thereby injuring the owner. (*m*)

against the animal not sufficient.

In a case which occurred about the same time, the prisoner was indicted for maiming a gelding, and the following facts appeared in evidence. The prisoner, who was servant to the prosecutor, had solicited him earnestly to let him have another horse called Boxer, instead of the one which was afterwards maimed; and which, at the time the mischief was done, was employed under the direction of the prisoner in carrying dung in the team. The prosecutor refused his request. Afterwards the prisoner was seen holding the horse in question by the tongue with one hand, while he beat him violently over the head with the butt end of a whip which he held in the other; and, subsequently, the horse was found lying in a meadow with its tongue hanging quite out of its mouth; one part of it, which was \*quite dead, being nearly severed from the other. But there was no other evidence that the prisoner had any malice against his master, except only that, on being remonstrated with on the barbarity of his conduct, he had declared, in the heat of his passion, that he would do the other horse an injury if his master did not let him have Boxer to go in the team. The immediate cause of his resentment against the animal did not appear. The case was left to the jury to consider whether the prisoner's conduct had been actuated by any motives of personal revenge against his master, or had proceeded from some sudden passion against the animal itself; and they were directed that, unless they were of opinion that it was done from some malicious motive against the owner, the prisoner did not come within the meaning of the statute, however brutal his conduct. The prisoner was thereupon acquitted. (*n*)

Shepherd's case. Maiming committed by a servant, from a dislike to the particular horse, holden not to be sufficient.

[\*1687]

Another case also is mentioned, where it appeared that the prisoner had cut the tendons of the hinder legs of several sheep, that had from time to time broken over into his inclosure; and the case was holden not to be within the statute. (*o*)

Cutting the tendons of sheep that had trespassed.

A very slight addition to the circumstances of the last-mentioned case would, it should seem, entitle it to a different consideration: though it is observed that, in all these

But it appears not to be necessary to

*m* Pearce's case, *cor.* Heath, J., *Gloucester Sum. Ass.*, 1789. 1 Leach 527. 2 East. P. C. c. 22. s. 16. p. 1072. The prisoner was then tried upon another indictment for the misdemeanor, convicted, and sentenced to two years' imprisonment. The same point

was ruled also by Heath, J., in *Kean's case*, O. B., 1789. 1 Leach 527, note (*a*).

*n* Shepherd's case, *cor.* Hotham, B., and Heath, J., O. B., 1790. 1 Leach 539. 2 East. P. C. c. 22. s. 16. p. 1073.

*o* Anon. said to have been decided by Heath, J. 2 East. P. C. c. 22. s. 16. p. 1073.



prove a  
previous  
existing  
malice  
against the  
owner.

[\*1688]

cases, there was reasonable evidence appearing upon the face of the transaction itself, to impute the motive of the fact to resentment against the particular animals, and not to any personal malice against the owner. (p) It appears, indeed, to have been agreed by the Judges that, in cases of this kind, it is not necessary to prove a previous existing [\*1688] \*malice against the owner: (q) and it is well observed that, upon the fact being proved to have been done wilfully, which can only proceed from a brutal or malignant mind, it seems to be a question solely for the consideration of the jury, to attribute the real motive to it, a clue to which will most probably be furnished by the transaction itself. (r) In a case where it appeared that the prisoner, in the night, broke into a stable where there was a gelding, which was to have run a race for forty guineas, and cut the sinews of the fore-leg of the gelding in order to prevent its running, in consequence of which it died: the prisoner, after an acquittal for the offence laid as a burglary, was again indicted for killing the horse, and capitally convicted. (s) And in a more recent case, where the indictment charged the prisoner in several counts with killing a mare by poison, and the evidence was that he committed the fact in order to prevent her from running a race, having betted against her; it was holden that this intent was sufficient to bring the case within the statute, and he was accordingly convicted. (t)

Aiders and  
abettors  
ousted of  
clergy, by  
9 Geo. I.  
c. 22.

[\*1689]

It has been holden, that an aider and abettor at the fact, in an offence within the statute 9 Geo. I. c. 22. is ousted of his clergy. In the case in which the point was discussed, the following circumstances appeared in evidence. The two prisoners, Midwinter and Sims, having conceived a prejudice against the prosecutor, on account of a prosecution which he was then carrying on against them for stealing rabbits, agreed to take their revenge on him, and to kill one of his breeding mares the same night: and they executed their plan in the following manner: Midwinter, with the [\*1689] \*assistance of Sims, caught the mare, buckled his own girdle about her neck, and fastened a girdle of Sims's to his own; and then Sims, having taken hold of the girdle fixed in this manner to the mare's neck, held it fast, in order to prevent her from getting away, while Midwinter, with a large sharp hook, gave her a deep wound in the belly, of which she died the same night. Upon these facts the Judges decided, contrary to the opinion of Foster, J., that Sims was ousted of his clergy. (u)

p 2 East. P. C. c. 22. s. 16. p. 1074.  
q Ranger's case, 1793. 2 East. P. C. c. 22. s. 16. p. 1074. 1 Leach 527. note (a).  
The point was not directly in judgment; but it does not appear to have been decided in any case that it is necessary to give express evidence of previous malice against

the owner.

r 2 East. P. C. c. 22. s. 16. p. 1074.  
s Dobbs's case, 1770. 2 East. P. C. c. 15. s. 25. p. 513. Ante, 943.  
t Dawson's case, 3 Chit. C. L. 1067, note (a).  
u Midwinter and Sims. (case of.) 1779.

## \*CHAPTER THE THIRTY-EIGHTH.

*Of injuring and destroying Timber and other Trees, Woods, Underwood, Roots, Shrubs, &c. (1)*

OFFENCES of the kind mentioned in the title to this chapter were treated only as trespasses and misdemeanors by several ancient statutes: (a) one of which, the 37 Hen. VIII. c. 6. made the malicious or unlawful barking any fruit-trees punishable by a forfeiture of treble damages to the party grieved, to be recovered by action of trespass, and also by a forfeiture to the king of 10*l.* in the name of a fine.

Trespasses and misdemeanors by ancient statutes.

The statute 1 Geo. I. stat. 2. c. 48. s. 1. provides that if any person shall maliciously break down, cut up, pluck up, throw down, bark, or otherwise destroy, deface, or spoil any timber tree or trees, fruit-tree or trees, or any other tree or trees, the party injured shall recover damages against

1 Geo. I. stat. 2. c. 48. s. 1. If any person shall maliciously break

Fost. Append. 415. 1 Leach 66, note (a).  
2 East. P. C. c. 22. s. 19. p. 1076. And see  
the point discussed *ante*, p. 37.

a 35 Hen. VIII. c. 17. 37 Hen. VIII. c. 6.  
43 Eliz. c. 7. 15 Car. II. c. 2. 22 and 23 Car.  
II. c. 7. See the 43 Eliz. c. 7. *ante*, 1110, 1111.  
And see 5 Burn. Just. Tit. *Wood*.

(1) The offences enumerated in this chapter, are, in this country, as in England, made the subject of statute provision and regulation. The statutes of the several states for the preservation of timber, and other trees, and for the prevention of trespasses upon lands, committed under such circumstances of wantonness or malice, as to render them the proper subjects of criminal prosecution, are strikingly similar, and are generally in language of similar import to that contained in the English statutes relative to the same offences. The following is the only case I have met with in the American reports.

PENNSYLVANIA.—In the case of the Commonwealth v. Hoover & al. 1 Browne, Appx. xxv. (referred to in Wharton's Dig. title Criminal Law, 216,) it was decided, that on an indictment for cutting timber trees, it was sufficient to show, that the prosecutor was in possession under a claim of title to the land on which the timber was cut. A motion in arrest of judgment, and for a new trial, was made for the following reasons. 1. That the indictment did not specify the particular kind of timber trees, whether black or white oak:—2. That the prosecutor did not shew any title to the land on which the timber was cut:—3. That he did not prove any possession in himself of the piece of ground whereon the said timber was cut, nor any right of possession, except by producing a survey which was said to include it:—4. That the act of Assembly on which the defendants were indicted is obsolete by *non user*. These several reasons were overruled by the court, who decided, “that the indictment was sufficiently clear and specific in stating the kind of timber (which were alleged to be twenty oak timber trees) charged to have been cut by the defendants on the land of the prosecutor; that the title of the prosecutor to the land on which the timber was cut, could not be brought in question, on the charge contained in this indictment, if it appeared that he was in full possession, under a claim of title; and that the possession of the property was sufficiently proved to warrant the finding of the jury.”

down, de-  
stroy, spoil,  
&c. any  
tree or  
trees, the  
party in-  
jured shall  
recover  
damages;  
and the of-  
fenders

[\*1691]

may be  
convicted  
of such  
trespasses  
and offen-  
ces.

6 Geo. I. c.  
16.

S. 1. gives  
further re-  
medy for  
the owners  
of trees, &c.  
cut down,  
spoiled, &c.  
against the  
parish.

S. 2. makes  
the offences  
of destroy-  
ing woods,

[\*1692]

under-  
woods,  
trees, &c.  
subject to  
the juris-  
diction of  
justices of  
peace, and

the inhabitants of the parish, vill, &c. or place where such tree, &c. shall be so maliciously broken down, &c. in the same manner and form as damages are to be yielded for hedges and dikes overthrown by persons in the night, by the stat. 13 Ed. I. st. 1. c. 46.; and it provides, (by s. 2.) for the conviction and punishment of the offenders for the trespasses and offences aforesaid, by two or more justices of the peace, in or out of sessions. The fourth section relates to \*the malicious burning of woods and coppices: and, as we have seen, (b) makes such offence a felony.

The statute 6 Geo. I. c. 16., which is entitled, "An act to explain and amend the 1 Geo. I. stat. 2. c. 48." recites, amongst other things, that some doubts had arisen whether the offences committed in the day time, mentioned in that act, were punishable by the said act: and recites also, that there was no provision made in the said act for punishing the offences committed by persons who should break open, throw down or destroy the hedges, gates, &c. or other inclosures of woods, coppices, &c.: and then enacts, (by s. 1.) "That if any person or persons whatsoever shall, either by day or by night, cut, take, destroy, break, throw down, bark, pluck up, burn, deface, spoil or carry away any wood, springs or springs of wood, trees, poles, wood, tops of trees, underwoods, or coppice-woods, thorns or quicksets, without the consent of the owner or owners of such woods, wood grounds, parks, chases or coppices, plantations, timber-trees, fruit-trees, or other trees, thorns, or quicksets, or of the person chiefly intrusted with the care and custody thereof; or shall break open, throw down, level or destroy any hedges, gates, posts, stiles, railing, walls, fences, dikes, ditches, banks, or other inclosures of such woods, wood grounds, parks, chases or coppices, plantations, timber-trees, fruit-trees or other trees, thorns or quicksets;" the parties damaged shall recover recompence against the parish, &c. in the same manner and form as for dikes and hedges, overthrown by persons in the night, or at another season when they suppose not to be espied by the statute 13 Edw. I. stat. 1. c. 46. unless the offender be convicted within six months. The second section then enacts, "That if any person or persons at any time or times in a riotous, open, tumultuous, or in a secret and clandestine manner, forcibly or wrongfully and maliciously, and \*without the consent of the proprietor, wood-reeve, wood-keeper, or person chiefly intrusted with the care, oversight and custody of such woods, wood grounds, parks, chases, coppices or plantations, shall cut down, destroy, break, bark, throw down, burn, take, deface, spoil or carry away any wood or springs of wood, underwood or coppice-wood, or shall in such a riotous, forcible,

b *Ante*. Chap. on *Arson and Burning*. p. 1665, where this clause of the statute is stated at large.

tumultuous, secret or clandestine manner as aforesaid, maliciously break open, throw down, level or destroy any hedges, gates, posts, stiles, rails, fences, ditches, banks or inclosures of such woods, wood grounds, coppices, plantations, timber-trees, fruit-trees, or other trees, thorns or quicksets, that then it shall and may be lawful to and for any two or more justices of the peace of the county, riding, division, city, town, borough or corporation wherein any such offence or offences shall be committed, or for the justices in open sessions, upon complaint to them made by any inhabitant of the aforesaid parish, hamlet, vill or place, or of the owner of such tree or trees, woods, wood grounds, parks, chases, coppices or plantations, or of any other, to cause such offender or offenders to be apprehended for the trespasses and offences aforesaid, or any of them, and to hear and finally determine and adjudge all and every the offence and offences aforesaid: and if such justices shall convict any person or persons of all or any the trespasses and offences aforesaid, then such justices, immediately after such conviction, shall and are hereby required to inflict all and every the same penalties and punishments in the said act of the first year of his majesty's reign hereinbefore mentioned, as fully and largely, and in the same manner, for all and every the crimes and offences hereinbefore expressed, although not contained in the said act, as if the same were here again repeated and re-enacted."

punishable  
as under 1  
Geo. I. st.  
2. c. 48.

The statute 9 Geo. I. c. 22. s. 1. (Black Act,) enacts, "That if any person or persons shall unlawfully and maliciously cut down or otherwise destroy any trees planted in any avenue, or growing in any garden, orchard or plantation, for ornament, shelter, or profit; or shall forcibly rescue any person being lawfully in custody of any officer or other person for any the offences before-mentioned; or if any person or persons shall by gift or promise of money or other reward procure any of his majesty's subjects to join him or them in any such unlawful act; every person so offending, being thereof lawfully convicted, shall be adjudged guilty of felony, without benefit of clergy." We have already seen that, by s. 14. of this act, offences against it may be tried in any county in England. (c)

9 Geo. I. c.  
22. s. 1.  
The mali-  
[\*1693]  
ciously de-  
stroying  
trees plant-  
ed in cer-  
tain places  
for orna-  
ment, shel-  
ter, or pro-  
fit, made  
felony  
without  
clergy.

The 29 Geo. II. c. 36. entitled, "An act for inclosing, by the mutual consent of the lords and tenants, part of any common, for the purpose of planting and preserving trees fit for timber or underwood, and for more effectually preventing the unlawful destruction of trees," enacts, (by s. 6.) that if any person, after the time thereby limited for appealing against the agreement therein mentioned for the inclosure of any wastes, woods, or pastures, "shall either by day or night unlawfully cut, take, destroy, break, throw down, bark, pluck

29 Geo. II.  
c. 36.

S. 6. gives  
damages  
against the  
parish for  
the destruc-  
tion, spoil-

ing, &c. of trees in new inclosures.

S. 7. Two justices may punish the offender, as under the 6 Geo. I. c. 16.

S. 8. Persons destroying, [\*1694] spoiling, &c. any tree on commonable grounds, subjected to the like penalty.  
6 Geo. III. c. 36.

Cutting down, spoiling, &c. in the night-time, timber-trees, roots, &c. of 5s. value, in gardens, &c. to be felony, punishable by transportation.

And aiders, abettors, and receivers of the roots, &c. shall be liable to the same punishment.

up, burn, deface, spoil or carry away, any trees growing within any such inclosure, without the consent of the owner or owners thereof," such owners shall have recompence from the parish, &c. adjoining, and recover damages; as is directed for dikes and hedges overthrown, by the 13 Ed. I. stat. 1. c. 46.; unless the offender be convicted within six months. It is then enacted, (by s. 7.) that two justices of the peace of the county, &c. or the justices in sessions, &c. upon complaint to them made, may cause every such offender "to be apprehended for such *trespass*," and may hear and determine the same, and inflict the like penalty and punishment on every offender by them convicted, as is directed to be inflicted on offenders by the statute 6 Geo. I. c. 16. The eighth section further enacts, that if any person "shall unlawfully cut, take, destroy, \*break, throw down, bark, pluck up, burn, deface, spoil or carry away any tree growing in any waste, wood or pasture, in which any person or persons, or body or bodies politic or corporate, hath or have right of common, every such offender shall and may be in like manner convicted of such offence, and shall incur the like penalty."

The statute 6 Geo. III. c. 36. reciting that persons had of late years "wilfully and maliciously" cut down, barked, or otherwise destroyed timber trees, and trees likely to become timber, to the great detriment of the owners of such trees, and discouragement of planting; and reciting also the frequent plundering and destroying of valuable roots, shrubs, and plants, in nursery-grounds, gardens, and other inclosed grounds, enacts, "That all and every person and persons who shall, in the night-time, lop, top, cut down, break, throw down, bark, burn, or otherwise spoil or destroy, or carry away, any oak, beach, ash, elm, fir, chesnut or asp, timber tree or other tree or trees standing for timber, or likely to become timber, without the consent of the owner or owners thereof first had and obtained; or shall, in the night-time, pluck up, dig up, break, spoil or destroy, or carry away, any root, shrub or plant, roots, shrubs or plants, of the value of five shillings, and which shall be growing, standing or being in the garden-ground, nursery-ground, or other inclosed ground, of any person or persons whomsoever," shall be deemed to be guilty of felony; and may be transported for seven years. And it then further enacts, "That all and every person and persons who shall be wilfully aiding, abetting or assisting, in such cutting down, breaking, throwing down, barking, burning or otherwise spoiling or destroying, or carrying away, any such oak, beach, ash, elm, fir, chesnut or asp, timber tree, or other tree or trees standing for timber, or likely to become timber, as aforesaid; or in such plucking up, digging up, cutting, breaking, spoiling or destroying, or carrying away, such root, shrub or plant, roots, shrubs or plants, as aforesaid, of the



\*value aforesaid; or who shall buy or receive such root, shrub or plant, roots, shrubs or plants, of the value aforesaid, knowing the same to be stolen, shall be subject and liable to the same punishment, as if he, she or they, had stolen the same."

A statute passed in the same session of parliament, 6 Geo. III. c. 48. s. 1. enacts, "That every person who shall wilfully cut or break down, bark, burn, pluck up, lop, top, crop, or otherwise deface, damage, spoil, or destroy, or carry away, any *timber tree* or trees, or trees likely to become timber, or any part thereof, or the lops or tops thereof, without the consent of the owner or owners thereof first had and obtained, or, in any of his majesty's forests or chases, without the consent of the surveyor or surveyors, or his or their deputy or deputies, or person or persons entrusted with the care of the same," shall, upon conviction before a justice of the peace, for the first offence forfeit and pay a sum not exceeding twenty pounds, together with the charges of the conviction; and upon non-payment be committed to gaol for any time not exceeding twelve nor less than six months, or until payment; and, for a second offence, shall forfeit and pay a sum not exceeding thirty pounds, with the charges; and, upon non-payment, be committed for any time not exceeding eighteen nor less than twelve months, or until payment: "and if any person so convicted shall be guilty of the like offence a third time, and shall be thereof convicted in like manner, such person shall be deemed guilty of felony; and the court by and before whom such person shall be tried, shall and hereby hath authority to transport such person or persons for the space of seven years."

The second section of this statute enacts, "That all oak, beech, chestnut, walnut, ash, elm, cedar, fir, asp, lime, sycamore, and birch trees, shall be deemed and taken to be timber trees within the true meaning and provision of this act."

\*The third section enacts, "That all and every person who shall pluck up or cut, spoil or destroy, or take or carry away, any root, shrub, or plant, roots, shrubs, or plants, out of the fields, nurseries, gardens, or garden-grounds, or other cultivated lands, of any person or persons whomsoever, without the consent of the owner or owners thereof first had and obtained," and shall be convicted before a justice of the peace, shall, for the first offence, forfeit not exceeding forty shillings, together with the charges of the conviction; and, for a second offence, forfeit not exceeding five pounds, with charges: "And if any person, so before convicted, shall a third time commit the like offence, and shall be thereof convicted, such person so convicted shall, for such third offence, be deemed guilty of felony; and the court before whom such person shall be tried, shall, and hereby hath authority to transport such person for the space of seven years."

6 Geo. III. c. 48. s. 1. Cutting down, spoiling, &c timber-trees, made punishable by fines, for the first and second offences.

And a third offence is made felony, punishable by transportation.

[\*1696] S. 3. Cutting, spoiling, or carrying away roots, shrubs, or plants, made punishable by fines for the first and second offences.

A third offence is made felony; punishable by transportation.



S. 4. Cutting, &c. or carrying away wood or underwood, made punishable by fines for the first and second offences.

[\*1697]

And any person offending a third time is to be deemed an incorrigible rogue.

S. 6. Unless the forfeitures are paid, the offenders may be imprisoned and whipped.

Hindering apprehension of offenders, &c.

9 Geo. III. c. 41. s. 8. extends the fourth section of 6 Geo. III. c. 48. to persons destroying or carrying away hollies, thorns, or

The fourth section of this statute recites, that many idle and disorderly persons had of late years made a practice of going into the woods, &c. of his majesty's subjects, and had there cut and carried away great quantities of young wood of various kinds, for making of poles and walking sticks, and for various other uses: and, in beach, and other woods and underwoods, under pretence of getting fire wood, had cut down, boughed, split off, or otherwise damaged or destroyed the growth of the said woods, and underwoods, to the great injury and damage of the owners thereof; and then enacts "that all and every person and persons who shall go into the woods, underwoods, or wood grounds, of any of his majesty's subjects, not being the lawful owner or owners thereof, and shall there cut, lop, top, or spoil, split down, or damage, or otherwise destroy, any kind of wood, or underwood, poles, sticks of wood, green stubs, or young trees, or carry or convey away the same: or shall have in his, her, or their custody, any kind of wood, underwood, poles, sticks of wood, green stubs, or young trees; and shall not give a satisfactory account how he, she, or they \*came by the same," and shall be convicted before a justice, shall, for the first offence, forfeit not exceeding forty shillings, together with the charges of the conviction; and for a second offence shall forfeit not exceeding five pounds, with charges; "and if any person or persons shall commit any of the offences aforesaid a third time, that then such person and persons, being duly convicted thereof, according to law, shall be deemed and adjudged an incorrigible rogue or rogues, and shall be punished as such."

The sixth section provides, that unless the respective forfeitures be paid down upon conviction, the justice, where not otherwise directed by the act, may commit the offender to the house of correction, for the first offence, for one month to hard labour, and to be once whipped: and for the second offence, for three months, to hard labour, and to be whipped once in each of the three months.

The statute further (by s. 7. 8. and 9.) imposes a penalty on persons hindering the apprehension of offenders, makes provision as to the application of the forfeitures, (giving one moiety to the informer, and the other to the party grieved; and gives a form of conviction.

The statute 9 Geo. III. c. 41. s. 8. reciting the fourth section of the 6 Geo. III. c. 48. and the great destruction which had been then lately made of *hollies, thorns, and quicksets*, enacts, "that the said clause in the 6 Geo. III. c. 48. and all and every the penalties, forfeitures, and punishments thereby inflicted, and all other provisions, clauses, matters, and things relating thereto, shall extend, and be deemed, taken, and construed to extend, and shall be applied, and put in execution, in relation to all his majesty's forests and chaces within this realm: and to all and every person or persons

who shall, without legal right or authority, by night or day, cut down, destroy, take, carry or convey away any *hollies*, *thorns*, or *quicksets* \*growing or being upon any of his majesty's said forests, or chaces, or within the woods or wood grounds of any of his majesty's subjects; or who shall have in his, her or their custody or possession, any such *hollies*, *thorns*, or *quicksets*, and shall not give a satisfactory account how he, she, or they came by the same; and shall be thereof convicted before any one or more of his majesty's justices of the peace, in the manner prescribed and directed by the said act." The statute then gives power to such justices to administer oaths, and proceed for the conviction and punishment of offenders, as fully and effectually as if the several provisions in the said act had been particularly repeated, and applied to the offences in this act specified. (e)

quicksets, or having them in [\*1698] possession, and not giving a satisfactory account of them.

The 13 Geo. III. c. 33. reciting the first and second sections of the statute 6 Geo. III. c. 48. and the doubts which had arisen, whether any other trees than those which were declared to be so by that statute should be deemed timber trees, enacts, "that the trees called *poplar*, *alder*, *larch*, *maple*, and *horn-beam*, shall also be deemed timber trees;" and the offences of damaging or carrying them away are subjected to the same penalties and punishments as are imposed in that statute upon offences of the like kind concerning trees therein deemed timber trees.

13 Geo. III. c. 33. extends the 6 Geo. III. c. 48. s. 1, and 2. to the trees called poplar, alder, larch, maple, and horn-beam.

The statute 45 Geo. III. c. 66. s. 1. recites the fourth section of the 6 Geo. III. c. 48. and also the act 9 Geo. III. c. 41. s. 8. and then reciting that great depredations had been committed in his majesty's woods and chaces, upon *bark*, enacts, "that the aforesaid clauses in the said recited acts, and all and every the penalties, forfeitures, and punishments thereby inflicted, and all other provisions, matters and things relating thereto, shall extend, and shall be applied and put into execution, in relation to all woods and wood \*grounds, belonging to his majesty in Great Britain, as well in right of his duchy of Lancaster, as otherwise, and whether such woods or wood grounds shall be within any of his majesty's forests or chaces, or not; and also to all and every persons and person who shall, without legal right or authority, by night or day, take, carry, or convey away, any *bark*, being in any forests or chaces, or woods or wood grounds belonging to his majesty, as well in right of his duchy of Lancaster, as otherwise, or within the woods or wood grounds of any of his majesty's subjects in Great Britain, or who shall have in his, her, or their custody or possession, any *bark*, and shall not give a satisfactory account how he, she, or they came by the same, and shall be thereof convicted before any one or more

45 Geo. III. c. 66. s. 1. extends the provisions of the 6 Geo. III. c. 48. s. 4. and the 9 Geo. III. c. 41. s. 8. to wood- [\*1699] grounds belonging to his majesty: and also extends the said provisions to persons taking away *bark* from forests, woods, &c. or having bark and

e This act of 9 Geo. III. c. 41. makes an erroneous recital of the 6 Geo. III. c. 48. but

the mistake was remedied by the statute 10 Geo. III. c. 30.

not ac-  
counting  
for it.

S. 3. Per-  
sons com-  
mitting of-  
fences more  
than three  
times to be  
punished as  
incorrigible  
rogues.

Construc-  
tion of  
some of the  
foregoing  
statutes.

justices of the peace in the manner prescribed and directed by the said first recited act."

It is also enacted by the third section of this statute of 45 Geo. III. "that if any person or persons shall commit any of the said offences specified in the said recited acts, of this act, more than three times, and shall be thereof convicted before any one or more of his majesty's justices of the peace, in the manner prescribed and directed by the said first recited act, every such person shall, for every such offence, committed subsequent to the third offence, be deemed and adjudged an incorrigible rogue or rogues, and shall be punished as such."

Upon the construction of these statutes it is observed that although the doubt recited in the preamble of the statute 6 Geo. I. c. 16. (*f*) seems principally to refer to the offences mentioned in the first section of the statute 1 Geo. I. stat. 2. c. 48. (*g*) and not to relate to the offences declared to be felony by the fourth section of that statute: yet the offences described in such fourth section seem to be (at least in part) included in the second section of the stat. 6 Geo. I. c. 16. wherein [*\*1700*] \*they are again treated as *trespasses*, and subjected to the summary jurisdiction of two magistrates. And the power given to the two justices, by the second section of the 6 Geo. I. c. 16. (*h*) is observed upon as still more remarkable, both in its terms and in its extent; and it is said that it can hardly be imagined that the legislature meant to enable two justices of the peace, out of sessions, to convict a person of felony, or to subject a person to the pains and penalties of felony for any offence which, as a trespass, is referred to the cognizance of such summary jurisdiction. (*i*)

An observation of a similar nature arises upon the first section of the 6 Geo. III. c. 48. (*k*) by which it would seem to be enacted that a justice of the peace may, in a summary manner, convict a person of felony, and sentence him to transportation for seven years. But, upon this, Dr. Burn observes: "Here seems to be a mistake. Being convicted *in like manner* implies a summary conviction, as before directed, before one justice; but it cannot be intended that a justice shall, in this manner, have power to transport a man. But the word *court*, afterwards, before which he shall be convicted (that is of assize or sessions, as it seemeth by the following words of the act,) implies a legal trial by jury. And, therefore, these words (*in like manner*) ought to be omitted." (*l*) It is elsewhere suggested that perhaps these words, *in like manner*, were intended only to mean *by the like evidence*. (*m*)

Again it is observed as extraordinary that the two acts 6 Geo. III. c. 36. and 6 Geo. III. c. 48. should have passed in the same session of parliament upon the same subject matter,

*f* Ante, 1691.

*g* Ante, 1690.

*h* Ante, 1691, 1692

*i* 2 East, P. C. c. 22. s. 6. p. 1056, 1057.

*k* Ante, 1695.

*l* 5 Burn. Just. Tit. Wood.

*m* 2 East, P. C. c. 16. s. 29. p. 590. note (a.)

without any reference to each other, enacting such different provisions. (n) But we have seen that when this \*matter [\*1701] was brought under the consideration of the Judges, they considered that, taking the two statutes together, their provisions would be, that if the property, taken or destroyed, were of the value of five shillings, and the offence were committed *in the night-time*, the offender may be prosecuted for the felony under the 6 Geo. III. c. 36; but that in other cases the offence must be prosecuted under the 6 Geo. III. c. 48. And that they also held that the court were not obliged to transport the offender under the first act, but might pass any other sentence that could be passed for a single felony. (o) With respect to the meaning of the word “night” in the statute 6 Geo. III. c. 36. it has been holden that the same rule, relative to day and night, must be observed in prosecutions founded upon it as prevails in cases of burglary. (p) In an indictment upon this statute it is necessary that the name of the owner of the trees should be correctly stated. (q)

It is further observed as a singular circumstance that the offences created by the 9 Geo. I. c. 22. (r) (the black act) should be altogether overlooked in the later statutes, the wording of which approximates so nearly to the 9 Geo. I. c. 22., and though the offences, created by the later statutes, are so much less penal than those named in the other. (s) And a very important distinction is suggested in the view and intent of the 9 Geo. I. c. 22. as contrasted with the other statutes; namely, that even supposing the words *wilfully* and *maliciously*, which occur in the preamble of the statute 6 Geo. III. c. 36. and of which the first only is used in the enacting part of the statute 6 Geo. III. c. 48. to be a descriptive part of the offence under those statutes, yet the whole scope of those statutes (which were intended to protect the property itself from depredation) shews that the word *maliciously* is only to be taken in its most general signification, as denoting an unlawful and bad act, an act done \**malo animo*, from an unjust [\*1702] desire of gain, or a careless indifference of mischief; (t) whereas, in order to bring an offender within the penalty of death, under the 9 Geo. I. c. 22. the malice must be *personal* against the *owner* of the property. (u) And it is further observed that perhaps the same distinction was in the contemplation of the legislature, when they made the fourth clause of the 1 Geo. I. st.

n 2 East. P. C. c. 22. s. 8. p. 1061.

o Howe's case, *ante* 1107. And see the note (a.)

p Kemp's case, *ante*, 1108.

q Patrick and Pepper (case of) 1 Leach 253, *ante*, 1143, *et sequ.*

r *Ante*, 1692, 1693.

s 2 East. P. C. c. 22. s. 8. p. 1061. where, in note (a), it is said that the only reference to the 9 Geo. I. c. 22. is in the ninth section of the 29 Geo. II. c. 36. which was to obviate

any conclusion that the remedies given by the statutes of 1 Geo. I. and 6 Geo. I. against the parish for damages were intended to be repealed by the 9 Geo. I. c. 22. giving a like remedy against the hundred.

t As to the meaning of the word *malice*, see *ante* 614, note (i).

u 2 East. P. C. c. 22. s. 8. p. 1062. And see as to the point of the malice being *personal* against the owner, several cases upon the 9 Geo. I. c. 22. *ante* 1686.

2. c. 48. (x) and when they afterwards passed the subsequent act of the 6 Geo. I. c. 16. followed up by the two statutes of the 6 Geo. III. more particularly when that fourth clause, considered by Mr. Justice Blackstone (4 Black. Com. 245.) to be still in force, is viewed as contrasted with the first and second clauses of the same statute, which are ejusdem generis with those subsequent statutes. And the learned writer states that this construction can alone reconcile all the several provisions. (y)

The statute 9 Geo. I. c. 22. has the word "trees," in the plural; whereas the statutes 6 Geo. III. c. 36. and 6 Geo. III. c. 48. have the words "tree or trees." But there seems to be good reason to contend that the expression in the 9 Geo. I. may be construed singulariter, upon the same ground upon which it has been considered that though the 22 and 23 Car. II. c. 7. s. 2. makes it felony to burn any *ricks* or *stacks* of corn, &c. in the night, yet the burning of *one rick*, &c. is within that statute. (z)

[\*1703]

## \*CHAPTER THE THIRTY-NINTH.

*Of Cutting Hopbinds. and of Destroying Heath, Fern, &c. or Madder Roots.* (1)

[\*1706]

## \*CHAPTER THE FORTIETH.

*Of Destroying Fences. Inclosures, Mounds of Fish Ponds, Banks of Rivers, and Sea Banks, Locks, and Works on Rivers, and other Public Works.*

[\*1718]

## \*CHAPTER THE FORTY-FIRST.

*Of Destroying or Injuring Turnpikes or Bridges.*

[\*1721]

## \*CHAPTER THE FORTY-SECOND.

*Of the Destroying and Damaging Mines and Engines.*

: *Idem*, 1665, 1691.

y 2 East. P. C. c. 22 s. 8. p. 1062, 1063.

z Hassel's case, *ante*, 1670. And 3 East.

P. C. c. 22 s. 8. p. 1062.

This and the four following chapters, which relate wholly to the *Great Britain*, are omitted

## \*CHAPTER THE FORTY-THIRD.

*Of Destroying and Injuring Manufactures.*

## \*CHAPTER THE FORTY-FOUR.

[\*1731]

*Of Destroying and Damaging Ships and other Vessels, and Articles thereunto belonging. (1)*

THE offences of *burning and setting fire* to ships and other vessels have been mentioned in a preceding Chapter; (a) and it remains to mention in this place the statutable enactments which are not confined to that mode of destruction.

The statute 22 and 23 Car. II. c. 11. s. 12. enacts, "that if any captain, master, mariner or other officer belonging to any ship shall wilfully cast away burn or otherwise destroy the ship unto which he belongeth or procure the same to be done he shall suffer death as a felon." And the statute 1 Ann. stat. 2. c. 9. s. 4. enacts, "that if any captain, master, mariner, or other officer belonging to any ship, shall wilfully cast away, burn, or otherwise destroy the ship unto which he belongeth, or procure the same to be done, to the prejudice of the owner or owners thereof, or of any merchant or merchants that shall load goods thereon, he shall suffer death as a felon." And (by s. 5.) such offences committed on the high seas, or where the admiralty has jurisdiction, are to be tried by commission as directed by the 28 Hen. VIII. c. 15. (b) for the trial of pirates; and the benefit of clergy is excluded. These enactments, however, will probably be considered as superseded by more recent statutes.

The statute 12 Ann. st. 2. c. 18. s. 3. makes the entering by force on board any ship in distress, and destroying the \*marks on the goods punishable as a misdemeanor on summary conviction before two justices of the peace. (c) The fifth section relates to a more serious offence; and enacts, "that if any person or persons shall make, or be assisting in the making any hole in the bottom side or any other part of

22 & 23  
Car. II. c.  
11. s. 12.  
Captain,  
master, &c.  
of a ship  
wilfully de-  
stroying  
her to suf-  
fer death  
as a felon.

1 Ann. st. 2.  
c. 9. s. 4.  
Captain,  
master, &c.  
wilfully de-  
stroying a  
ship, to the  
prejudice  
of the own-  
er, &c. to  
suffer death  
as a felon.

12 Ann. st.  
2. c. 18. s.  
3.

[\*1732]

S. 5. Mak-  
ing holes in  
a ship in  
distress,

a *Ante*, Chap. on *Arson*, &c. p. 1667. *et sequ.*

b *Ante*, 147.

c And see as to the plundering vessels in distress or wrecked, *ante*, 1207, *et sequ.*

(1) Although the statutes contained in this chapter can have no operation in the United States, yet as the provisions and enactments which they contain may be considered useful and important in every commercial country, and may hereafter serve as guides for similar statutes of our own, they are retained in this edition.—Editor.



stealing  
pump, &c.  
felony  
without  
clergy.

any ship or vessel so in distress, as aforesaid, or shall steal any pump belonging to any ship or vessel so in distress, as aforesaid, or shall be aiding or abetting in the stealing such pump as aforesaid, or shall wilfully do any thing tending to the immediate loss or destruction of such ship or vessel, such person or persons shall be and are hereby made guilty of felony; without any benefit of his, her or their clergy." This act was made perpetual by 4 Geo. I. c. 12. s. 1.

We have seen in a former part of this work that by the statute 8 Geo. I. c. 24. persons forcibly entering merchant ships, and throwing overboard or destroying any part of the goods or merchandize belonging thereto, are punishable as pirates. (*d*)

26 Geo. II.  
c. 19. s. 1.  
Persons  
plundering,  
destroying,  
&c. goods  
and effects  
belonging  
to a ship in  
distress or  
wrecked,  
or putting  
out false  
lights, guilt-  
y of felony  
without  
clergy.  
[\*1733]

The statute 26 Geo. II. c. 19. s. 1. enacts, "that if any person or persons shall plunder, steal, take away or destroy any goods or merchandize, or other effects, from or belonging to any ship or vessel of his majesty's subjects, or others, which shall be in distress, or which shall be wrecked, lost, stranded, or cast on shore in any part of his majesty's dominions, (whether any living creature be on board such vessel or not,) (*e*) or any of the furniture, tackle, apparel, provision, or part of such ship or vessel; or shall beat or wound with intent to kill or destroy, or shall otherwise wilfully obstruct the escape of any person endeavouring to save his or her life from such ship or vessel, or the wreck thereof; or if any person or persons shall put \*out any false light or lights with intention to bring any ship or vessel into danger; then such person or persons so offending shall be deemed guilty of felony, and being lawfully convicted thereof, shall suffer death as in cases of felony, without benefit of clergy." (*f*) By s. 18. this statute is not to extend to *Scotland*.

12 Geo. III.  
c. 24. Per-  
sons wilful-  
ly destroy-  
ing ships of  
war, arse-  
nals, dock-  
yards, &c.  
or any tim-  
ber, &c. or  
stores, guilt-  
y of felony  
without  
clergy.

The statute 12 Geo. III. c. 24. relates to the king's ships of war, arsenals, &c. and enacts, "that if any person or persons shall, either within this realm, or in any of the islands, countries, forts, or places thereunto belonging, wilfully and maliciously set on fire, or burn, or otherwise destroy, or cause to be set on fire, or burnt, or otherwise destroyed, or aid, procure, abet, or assist in the setting on fire, or burning or otherwise destroying of any of his majesty's ships or vessels of war, whether the said ships or vessels of war be on float or building, or begun to be built, in any of his majesty's dock-yards, or building or repairing by contract in any private yards, for the use of his majesty, or any of his majesty's arsenals, magazines, dock-yards, rope-yards, victualling offices, or any of the buildings erected therein, or belonging thereto; or any timber or materials there placed for build-

*d* *Ante*, Chap. on *Piracy*, p. 137.

*e* See the explanation of the words living creature, &c. *ante*, 1207.

*f* The several provisions of this act against

the plundering of vessels lost or stranded, the detection of offenders, trial, &c. are mentioned, *ante*, 1208, *et sequ.*

ing, repairing, or fitting out of ships or vessels; or any of his majesty's military, naval, or victualling stores, or other ammunition of war, or any place or places where any such military, naval, or victualling stores, or other ammunition of war, is, are, or shall be kept, placed or deposited;" the person or persons guilty of any such offence shall be adjudged guilty of felony, and suffer death without benefit of clergy. By the second section persons committing these offences out of the realm may be indicted and tried for the same either in any county within the realm, or in the place where the offence shall have been actually committed, as his majesty may deem most expedient for bringing such offender to justice. (g)

\*The statute 29 Geo. III. c. 46. s. 1. relates to the destroying ships, &c. in *Scotland*; and enacts, "that if any owner of or captain, master, officer, or mariner, belonging to any ship or vessel, shall wilfully cast away, burn, or otherwise destroy, the ship or vessel of which he is owner, or to which he belongeth, or in any wise direct or procure the same to be done, with intent or design to prejudice any person or persons that hath or shall underwrite any policy or policies of insurance thereon, or of any merchant or merchants that shall load goods therein, or of any owner or owners of such ship or vessel, the person or persons offending therein, being thereof lawfully convicted before any court competent to the trial of such crimes, in that part of Great Britain called *Scotland*, shall suffer death, as in other cases of capital crimes."

[\*1734]  
29 Geo. III.  
c. 46. s. 1.  
(*Scotland*.)  
If any owner, captain, &c. destroy the ship, with intent to prejudice the underwriters, he shall suffer death.

The statute 33 Geo. III. c. 67. s. 5. which makes it a capital offence to burn or set fire to a ship, has been mentioned in a former Chapter. (h) The next section of the statute enacts, "that if any seaman or seamen, keelman or keelmen, caster or casters, ship carpenter or ship carpenters, or other person or persons, shall wilfully and maliciously destroy or damage any ship, keel, or other vessel, (otherwise than by fire) every seaman, keelman, caster, ship-carpenter, and other person so offending," being thereof lawfully convicted upon any indictment in any court of oyer and terminer, or general or quarter sessions of the peace for the county, shire, riding, &c. wherein the offence was committed, shall be adjudged guilty of felony, \*and shall be transported to some of his majesty's dominions beyond the seas, for any term of years not exceeding fourteen nor less than seven years.

33 Geo. III.  
c. 67. s. 6.  
Any seaman or other person maliciously destroying or damaging any ship, &c. to be guilty of felony, and transported for 14 years.

[\*1735]

The seventh section enacts, "that in case any of the offen-

S. 7. As

g Some offences of a similar nature may be inquired of and tried by courts martial by the naval articles of war, s. 24 and 25. as given in 22 Geo. II. c. 33. And by the twenty-sixth article, "care shall be taken in the conducting and steering of any of his majesty's ships, that through wilfulness, negligence, or other

defaults, no ship be stranded or run upon any rocks or sands, or split or hazarded, upon pain that such as shall be found guilty therein be punished by death, or such other punishment as the offence, by a court-martial, shall be judged to deserve."

h *Ante*, Chap. on *Arson*, &c. p. 1668.

to the trial  
of offences  
committed  
on the high  
seas.

Limitation  
of prosecu-  
tions.

43 Geo. III.  
c. 113. :  
Persons  
wilfully de-  
stroying  
any ship,  
&c. with  
intent to  
defraud,  
&c. guilty  
of felony  
without  
clergy.

S. 3. as to  
the trial of  
[\*1736]  
offences  
committed  
within the  
body of  
any coun-  
ty, or on  
the high  
seas.

res hereinbefore described or mentioned shall be committed on the high seas, then, and in every such case the offence or offences, so committed, shall be triable, and the person or persons so offending may be prosecuted and tried by virtue of this act, in any session of oyer and terminer and gaol delivery for the trial of offences committed on the high seas, within the jurisdiction of the admiralty of England." By the eighth section prosecutions are limited to twelve calendar months after the offence. This act was at first only temporary, but made perpetual by the 41 Geo. III. c. 19. s. 4.

The late statute 43 Geo. III. c. 113. recites the provisions of some former acts 4 Geo. I. c. 12. s. 3. and 11 Geo. I. c. 29. s. 5, 6, and 7. and repeals those provisions: and then (by s. 2.) enacts, "that if any person or persons shall wilfully cast away, burn, or otherwise destroy any ship or vessel, or in any wise counsel, direct, or procure the same to be done, and the same be accordingly done, with intent or design, thereby wilfully and maliciously to prejudice any owner or owners of such ship or vessel, or any owner or owners of any goods loaden on board the same, or any person or persons, body politic or corporate, that hath or have underwritten or shall underwrite any policy or policies of insurance upon such ship or vessel, or on the freight thereof, or upon any goods loaden on board the same, the person or persons offending therein, being thereof lawfully convicted, shall be deemed and adjudged a principal felon or felons, and shall suffer death, as in cases of felony, without benefit of clergy."

The third section enacts, as to the trial of such offences, "that if any such ship or vessel shall be wilfully cast away, \*burnt, or otherwise destroyed, within the body of any county of this realm, that then the said several offences, as well in wilfully casting away, burning or otherwise destroying such ship or vessel, as in counselling, directing or procuring the same to be done as aforesaid, shall and may be respectively inquired of, tried, determined, and adjudged, in the same courts, and in such manner and form as felonies done within the body of any county, by the laws of this realm, now are to be or by virtue of this act hereafter may be inquired of, tried, determined, and adjudged; and if any such ship or vessel shall be wilfully cast away, burnt or otherwise destroyed, on the high seas, then that the said several offences, as well in wilfully casting away, burning, or otherwise destroying any such ship or vessel, as in counselling, directing, and procuring the same to be done as aforesaid, shall and may be respectively inquired of, tried, determined, and adjudged, before such court, and in such manner and form as in and by an act made in the eight-and-twentieth year of the reign of king Henry the eighth, (i) intituled, *For Pirates*, is appointed

\* See ante, Chap. on Piracy, p. 135, et sequ.

and directed for the inquiring, trying, determining, and adjudging of felonies upon the high seas."

The fifth section enacts, "that in all cases whatsoever, in which any person or persons shall hereafter procure direct counsel or command any other person or persons to commit or shall abet any other person or persons in committing any felony whatsoever, or shall in any wise whatsoever become an accessory or accessories before the fact to any felony whatsoever, whether such principal felony be committed within the body of any county within this realm, or upon the high seas, and whether such procuring, directing, counselling, commanding, and abetting, or otherwise becoming accessory or accessories before the fact shall have been committed or done within the body of any county within this realm, or upon the high seas, that \*then and in all such cases, the offence of the person or persons so procuring, directing, counselling, commanding, or abetting such felony, or so in any wise becoming accessory or accessories before the fact to such felony, shall and may be inquired of, tried, determined, and adjudged, in case such principal felony shall have been committed within the body of any county within this realm, by the course of the common law, either within such county wherein the said principal felony shall have been committed, or within the county wherein the said offence in procuring, directing, counselling, commanding, and abetting or otherwise becoming accessory or accessories before the fact shall have been committed or done; and in case the said principal felony shall have been committed upon the high seas, then the said offence in procuring, directing, counselling, commanding, or abetting such felony, or of so becoming an accessory or accessories before the fact, to the same, shall and may be inquired of in and by such court, and in such manner and form as in and by the said act made in the eight-and-twentieth year of the reign of king Henry the Eighth, is appointed and directed for the trying, determining, and adjudging, of felonies done upon the high seas. (k)

S. 5. As to the trial of accessories before the fact.

[\*1737]

\*The 49 Geo. III. c. 122. s. 12. enacts "that if any person [\*1738]

k Before the passing of this act a case occurred upon the repealed statute of 11 Geo. I. c. 29. s. 6 & 7. in which the master of a ship was indicted at the Admiralty sessions for wilfully destroying the ship on the high seas; and two persons, the owners of the ship, were indicted for procuring the master to destroy the ship on the high seas, with intent to defraud the underwriters. The master was convicted and executed. But as the evidence against the owners only shewed that they had given orders, *when on shore*, to the master to effect the guilty purpose, it was objected on their behalf that they had committed no offence within the jurisdiction of the admiralty, and that they were, therefore, entitled to be

acquitted. The jury having found them also guilty, the point was submitted to the consideration of the twelve Judges, who, after hearing the case argued twice, were all of opinion, that whether the act in question (11 Geo. I. c. 29.) were considered as making the persons who directed or procured the destroying of a ship principals or accessories, yet inasmuch as no act was done by the owners within the jurisdiction of the admiralty, they were not subject to that jurisdiction, and that consequently the trial was improperly laid. *Easterby and M'Farlane, (case of,) Adm. Sess. 1802, and November 1802. 1 East. P. C. Addend. xxvi.*

49 Geo. III. c. 122. s. 12. cutting away or defacing buoys, buoy-ropes, &c. felony, punishable by transportation, &c. or persons shall wilfully cut away, cast adrift, remove, alter, deface, sink, or destroy, or shall do or commit any act with intent and design to cut away, cast adrift, remove, alter, deface, sink, or destroy, or in any other way injure or conceal any buoy, buoy-rope, or mark, belonging to any ship or vessel, or which may be attached to an anchor or cable belonging to any ship or vessel whatever, whether in distress or otherwise, such person or persons so offending shall, on being convicted of such offence, be deemed and adjudged to be guilty of felony, and shall be liable to be transported for any term not exceeding seven years, or, in mitigation of such punishment, to be imprisoned for any number of years at the discretion of the court in which the conviction shall be made."

Statutes of a limited and local operation, 2 Geo. III. c. 28. s. 13.

Besides the statutes which have been thus cited, there are some others of a more limited and local operation, which may be briefly noticed. The 2 Geo. III. c. 28. s. 13. enacts, that "if any person or persons shall cut, damage or spoil any cordage, cable, buoys, buoy-rope, head-fast, or other fast, fixed to any anchor or moorings, belonging to any ship or vessel at anchor or moorings in the river *Thames*, or any rope used for the purpose of mooring or rafting masts or timber, or shall be aiding or assisting therein, with an intent to steal the same;" such person or persons being convicted on the oath of two witnesses shall be transported for

39 Geo. III. c. 69.

[\*1739]

seven years. (*m*) The 39 Geo. III. c. 69. (a local act for improving the port of *London*.) s. 4. after providing as to

\*the burning, &c. of ships therein mentioned, (*n*) enacts, "that if any person or persons shall knowingly, wilfully or maliciously demolish, break down, cut or destroy any of the works to be made by virtue of this act, or any ship or vessel lying in said canal, or in any of the said docks, basons, cuts, or other works; then every such offender, being convicted thereof, shall suffer punishment by fine, imprisonment or transportation, at the discretion of the Judge, &c. before whom such offender shall be tried and convicted." And by a subsequent section (s. 105.) persons wilfully or maliciously cutting, &c. or in any manner destroying any rope, &c. by which any ship or vessel lying in the said canal, docks, &c. or in any place or places in the river *Thames*, between *London bridge* and the mouth of the river *Lea*, are moored or fastened, shall forfeit not exceeding £10. The 47 Geo. III. sess. 2. c. 2. s. 57 (local act.) relates to the damaging, &c. of shipping, or goods, &c. in *Folkestone harbour*. The 48 Geo. III. c. 130. relates to the jurisdiction of the *Cinque ports*, and (by s. 6.) enacts, that "if any person or persons shall wilfully cut away, cast adrift, remove, alter, deface, sink or destroy, or shall do or commit any act, with intent and design to cut

47 Geo. III. sess. 2. c. 2. s. 57.

48 Geo. III. c. 130.

*m* It is observed that as this clause does not expressly declare the offenders to be felons, there are grounds upon which it seems to rest

in misdemeanor only. 2 East. F. C. c. 22. s. 44. p. 1102. See *ante* 1346.

*n* *Ante*. Chap. on *Arson*, &c. p. 1669.

away, cast adrift, remove, alter, deface, sink, or destroy, or in any other way injure or conceal any buoy, buoy-rope, or mark, belonging to any ship or vessel, or which may be attached to any anchor or cable belonging to any ship or vessel whatever, within the jurisdiction aforesaid, with intent thereby to defraud or injure any person or persons whatsoever, or body corporate, such person or persons so offending shall on being convicted of such offence, be deemed and adjudged guilty of felony, and shall be transported for any term of years not exceeding fourteen years." And it enacts also, (by s. 12.) "that if any pilot, boatman or other person or persons, within the jurisdiction aforesaid, shall counsel, instruct, direct, advise, or procure any master or other person on board of any \*ship or vessel, within the jurisdiction aforesaid, whether such ship be at the time in distress or otherwise, to cut such ship's or vessel's cable or buoy-rope, or to do any other act whatever which shall or may tend to the destruction or wreck of such ship or vessel," with intent thereby to prejudice the owner of the vessel, or goods, or the underwriters, such offenders shall be guilty of felony, and liable to be transported for any period not exceeding fourteen years.

[\*1740]

Upon the words "cast away, or destroyed" in the repealed statutes 4 Geo. I. c. 12. and 11 Geo. I. c. 20. (o) it appears to have been ruled that if a ship were only run aground or stranded upon a rock, and were afterwards got off in a condition capable of being easily refitted, she could not be said to be *cast away or destroyed*, and that the case was not therefore within either of those statutes. (p)

Words  
"cast a-  
way or de-  
stroyed."

## \*CHAPTER THE FORTY-FIFTH.

[\*1741]

*Of overloading boats on the river Thames.*

## \*CHAPTER THE FORTY-SIXTH.

[\*1743]

*Of Offences by Bankrupts.*

THE statute 5 Geo. II. c. 30. s. 1. (made perpetual by 37 Geo. III. c. 124,) enacts, "that if any person or persons who shall at any time hereafter during the continuance of this act become bankrupt, within the intent and meaning of the several statutes made and now in force concerning bankrupts, or any of them, and against whom a commission of bankrupt

5 Geo. II.  
c. 30. s. 1.  
Persons be-  
coming  
bankrupts,

*o Ante*, 1735.

*p* De Londo's case, 1765, 2 East. P. C. c. 22. s. 42. p. 1098.



and not  
surrender-  
ing ;

and sub-  
mitting to  
be examin-  
ed ;

[\*1744]  
and fully  
disclosing  
their es-  
tates and  
effects and  
how they  
have been  
disposed of ;

and deli-  
vering up  
their es-  
tates and  
effects ;

such bank-  
rupts not  
surrender-  
ing and  
submitting  
to be exa-

under the great seal of Great Britain shall at any time here-  
after be awarded and issued out, whereupon the person  
or persons against whom such commission hath issued or  
shall issue, have or hath been or shall be declared bank-  
rupt or bankrupts, shall not within forty-two days after no-  
tice thereof in writing, to be left at the usual place of abode  
of such person or persons, or personal notice, in case such  
person or persons be then in prison, and notice given in the  
London Gazette, that such commission or commissions is  
are or have been issued, and of the time and place of a meeting  
of the commissioners therein named, or the major part of  
them, surrendered him her or themselves to the said commis-  
sioners named in the said commission or the major part of  
them, and sign or subscribe such surrender, and submit to be  
examined from time to time upon oath, or being of the people  
called Quakers, upon the solemn affirmation by law appointed  
for such people, by and before such commissioners, or the  
major part of them, by such commission authorised, and in  
all things conform to the several statutes already made and  
now in force concerning bankrupts ; \*and also upon such his  
her or their examination fully and truly disclose and disco-  
ver all his her or their effects and estate real and personal,  
and how and in what manner, to whom and upon what consi-  
deration, and at what time or times he she or they have or  
hath disposed of, assigned or transferred any of his her or  
their goods, wares, merchandises, monies or other estate and  
effects, (and all books, papers and writings relating thereun-  
to) of which he she or they was or were possessed, or in or to  
which he she or they was or were any ways interested or enti-  
tled, or which any person or persons had, or hath or have had  
in trust for him her or them, or for his or their use at any  
time before or after the issuing of the said commission, or  
whereby such person or persons, or his her or their family or  
families, hath or have, or may have or expect any profit, pos-  
sibility of profit, benefit or advantage whatsoever, except only  
such part of his her or their estate and effects, as shall have  
been really and *bonâ fide* before sold or disposed of in the  
way of his her or their trade and dealings ; and except such  
sums of money as shall have been laid out in the ordinary ex-  
pense of his her or their family or families ; and also upon  
such examination deliver up unto the said commissioners by  
the said commission authorised, or the major part of them, all  
such part of his her or their the said bankrupt's goods, wares,  
merchandises, money, estate and effects, and all books, pa-  
pers and writings relating thereunto, as at the time of such  
examination shall be in his her or their possession, custody  
or power (his her or their necessary wearing apparel, and the  
necessary wearing apparel of the wife and children of such  
bankrupt only excepted) then he, she or they the said bank-  
rupt or bankrupts, in case of any default or wilful omission in

not surrendering and submitting to be examined as aforesaid, or in case he she or they shall remove, conceal or embezzle any part of such his her or their estate real or personal, to the value of twenty pounds, or any books of account, papers or writings relating thereto, with an intent to defraud his \*her or their creditors, (and being thereof lawfully convicted by indictment or information,) (a) shall be deemed and adjudged to be guilty of felony, and shall suffer as felons without benefit of clergy, or the benefit of any statute made in relation to felons; and in such cases such felon's goods and estate shall go and be divided among the creditors seeking relief under such commission."

The second section enacts, "that the said commissioners authorised as aforesaid shall appoint, within the said forty-two days so appointed as aforesaid for the bankrupt to surrender and conform as aforesaid, not less than three several meetings for the purposes aforesaid, the last of which shall be on the forty-second day hereby limited for such bankrupt's appearance; except on commissions already issued since the said fourteenth day of May one thousand seven hundred and twenty-nine, where the person or persons against whom such commission issued has or have before surrendered and submitted to be examined; in which case the said commissioners authorised as aforesaid shall appoint only one sitting more for the purposes aforesaid, unless the assignee or assignees of the estate of such bankrupt shall think more sittings necessary, and desire the same; and three weeks' notice at least shall be given in the London Gazette of the time and place of such meetings." (b)

\*The third section enacts, "that it shall and may be lawful to and for the Lord Chancellor or Lord-keeper, or commissioners for the custody of the great seal of *Great Britain* for the time being, to enlarge the time for such person or persons surrendering him her or themselves, and disclosing and discovering his her or their estate and effects as aforesaid, as the said Lord Chancellor, Lord Keeper or such commissioners shall think fit, not exceeding fifty days, to be computed from the end of the said forty-two days, so as such order for enlarging the time be made by the said Lord Chancellor, Lord Keeper or such commissioners, six days at least before the time on which such person or persons was or were so to

mined, or removing, concealing, &c. estates, real or personal to the value of

[\*1745]

L20. or any books, &c. with intent to defraud, to be adjudged guilty of felony without clergy.

S. 2. The commissioners are to appoint meetings for the said purposes.

[\*1746]

S. 3. The Lord Chancellor, &c. may enlarge the time for surrendering.

a In Bullock's case, 1 Taunt. 71. Heath, J. remarked that some editions of the statutes do not give this act correctly, having in this place the words "being thereof convicted by judgment or information;" but that in the parliament roll the words are, by indictment or information. It is observed in 4 Ev. Col. Stat. Pt. IV. Cl. xxvi. *Bankrupts*, p. 87. note (3) that the words "indictment or information" occur in the preceding statutes. 4 and 5 Anne

and 5 Geo. I. c. 24. but that no instance ever occurred of the trial of a felony upon information.

b In 4 Ev. Col. Stat. Pt. IV. Cl. xxvi. *Bankrupts*, p. 88. note (4), it is said, that it has been taken for granted that the direction for giving three weeks' notice only applied to commissions which had issued before the act; but that the fair construction of the act itself appears to be otherwise.

surrender him her or themselves, and make such discovery as aforesaid."

Construc-  
tion of this  
statute.

It is observed, upon the first section of this statute, that it is decidedly imperfect in grammatical construction, and that a great part of it can have no legal operation: and that with respect to not making the disclosure required, or not delivering up the effects at the time of the examination, the sentence is as defective as if it had stood alone in the following terms; "if any bankrupt shall not make the disclosure hereby directed, or shall not deliver up his effects" —, without any further addition as to the consequence of such default. (c)

[\*1747]

It is said, that no instance has occurred of a capital punishment \*or (as is believed) of a capital conviction, for the mere omission to surrender. (d) And it appears, that the learned Judges presiding in the Court of Chancery have in many instances superseded commissions, in order to prevent a prosecution for not surrendering in time, where there has not appeared to be any intention in the bankrupt of defrauding his creditors by not appearing within the time appointed, and where his absence proceeded rather from an ignorance of the consequence, or accident. (e) Such an order does not, however, prevent a prosecution, but operates only as an intimation of the Chancellor's opinion that the bankrupt did not keep out of the way fraudulently, and that it is a case in which the Chancellor does not see reason to think that if prosecuted he would be convicted: (f) and it seems clear that there must be a wilful omission to surrender to constitute a felony. (g)

Very few points appear in the books upon the construction of this important section of the statute.

Objections  
to an in-  
dictment  
upon this  
statute.

In an early case four objections were taken on behalf of the prisoner to an indictment, which charged him with neglecting to surrender himself to be examined, &c. against the form of the statute. The first objection was that the statute enacts that "if any person against whom a commission of bankrupt hath been *awarded and issued out*, &c. shall not, within forty-two days after notice thereof in writing, surrender, &c.;" and that the indictment therefore should have not only stated that the commission was *awarded*, but that it had *duly issued*; there being a material difference in the

c 4 Ev. Col. Stat. Pt. IV. Cl. xxvi. *Bankrupts*, p. 87. note (2) where it is also said, that the preceding statutes 4 and 5 Ann. c. 17. s. 1. and 5 Geo. I. c. 24. s. 1. from which the first part of the clause in the 5 Geo. II. c. 30. s. 1. is almost literally copied are not open to this observation, as they enact generally, that the bankrupt, in case of any wilful default or omission in any of the premises, shall be guilty of felony without benefit of clergy. Qu.

the decision in Page's case reserved for the consideration of the twelve Judges in Trin. T. 1819.

d 4 Ev. Col. Stat. *Ibid.* p. 88.

e Ex parte Wood, 1 Atk. 222. Ex parte Shiles, 1 Madd. 249.

f By the Vice-Chancellor in Ex parte Shiles, 1 Madd. 249.

g *Id. Ibid.*

meaning of these words; the word *awarded* signifying the thing ordered to be done, and the word *issued* signifying the thing done. The second objection was \*taken upon the words [\*1748] of the act, which say that “after notice in the London Gazette, that such commission had been issued, the bankrupt shall surrender himself to the Commissioners named in the said commission, or the major part of them;” whereas, in one of the notices stated in the indictment, they had spun out their directions for the prisoner to surrender to all the five commissioners, leaving out the words, *or the major part of them*. The third objection was taken upon that part of the act which says, “that the bankrupt shall have notice that such commission has issued, and of the time and place of meeting of the commissioners therein named, &c.” and the other notice stated in the indictment, by which the bankrupt was required to surrender to three of the commissioners without *naming* any of the rest. The fourth objection was that there ought to have been an averment in the indictment, that the commissioners did sit, and that those commissioners should have been named; whereas they were not named in the notice, which only set forth that he was required to surrender to *the commissioners at Guildhall*; and it might as well be understood of the commissioners of sewers, or of the lieutenancy, as of the commissioners of bankrupts, for they all sit at the same *Guildhall*. The Court were of opinion that all these objections were good. (*h*)

It is observed that the principal nicety in framing an indictment on this statute consists in the recital of the proceedings before and under the commission. (*i*)

Nicety in framing indictments on this statute. [\*1749]

\*And the necessary evidence will require attention; as the trading, the petitioning creditor's debt, the act of bankruptcy, the issuing the commission, and the proceedings under it, must be regularly proved. “While the commission subsists, its validity may be assumed for certain civil purposes; but when a criminal case occurs, unless the party was a bankrupt, all falls to the ground.” (*k*) In a case where a defendant was indicted for refusing to give the commissioners an account of his effects, he was acquitted on the ground that he was an infant at the time the debts were contracted, and could not, therefore, be a bankrupt for debts which he was not obliged to pay. (*l*) And the Court of Chancery will not lend its aid to a prosecution on this statute by ordering the clerk under the commission to attend the trial, and produce the proceedings. (*m*)

*h* Rex v. Frith, O. B. 1738. 1 Leach 10. Upon this opinion of the Court being pronounced, the prosecutor moved that the indictment might be quashed. But the Court said it was by no means proper to encourage the quashing of indictments after prisoners have pleaded. The motion was accordingly refused; and the prisoner being put upon his defence, an acquittal was entered. 1 Leach

11. But the Court may in its discretion quash an indictment at any time before the jury are charged with the trial of the prisoner.

*i* 2 Chit. Crim. L. 511. notes.

*k* By Lord Ellenborough, C. J., in Rex v. Punshon, 3 Campb. 97.

*l* Rex v. Cole, 1 Ld. Raym. 443.

*m* 1 Hawk. P. C. c. 49. *Fraudulent Bankruptcy*, s. 7.

The following points are understood to have been decided in a recent case where the defendant was charged by the indictment with concealing his effects to the amount of 20*l.* with intent to defraud his creditors. First, that an averment in an indictment for felony, that a commission issued under the great seal of *Great Britain*, was sufficiently proved by evidence that it issued under the great seal of *Great Britain and Ireland*; secondly, that a bankrupt could not set up a prior secret act of bankruptcy to invalidate his commission; thirdly, that a creditor might prove the act of bankruptcy before the commissioners; and, fourthly, that a commission of bankruptcy was not liable to any of the stamp duties imposed by the 44 Geo. III. c. 98. (*n*)

[\*1750] \*In a late case it was ruled that in an indictment against a bankrupt, where the petitioning creditors' debt was alleged to be due to A., B., and C., surviving executors of the last will and testament of D., after proof that A., B., and C., were the executors, and were directed by the will to carry on the business, it was necessary to prove that they all assented to act in discharge of the trust: and that a general admission by the prisoner of a debt, due to the executors of D., would not supply the defect. (*o*)

It is clearly agreed that a bankrupt's wife cannot be examined on the part of the prosecution on an indictment for offences against this statute. (*p*)

Commitment of  
[\*1751] bankrupts by the commissioners. The statute contains various other provisions and regulations touching the proceedings against bankrupts and their examinations by the commissioners: and (by s. 16.) the commissioners have a power to commit the bankrupts or other persons to prison for refusing to answer, or not fully answering questions or interrogatories. (*q*)

*n* Rex v. Bullock, 2 Leach 996. 1 Taunt. 71. But upon the third point, viz. the proof of the act of bankruptcy by a creditor, a *Qu.* is made by the reporter in 2 Leach 996: and in 1 Taunt. 71. the marginal note upon this point is, "*Seemle* that commissioners of bankrupt may receive evidence of the act of bankruptcy from a creditor, who seeks to prove under the commission: or at least if they do, after evidence *aliunde* of the act of bankruptcy, proof that the commissioners declared the bankrupt to be such on the creditors' evidence will not disprove the allegation that he was duly declared a bankrupt." But it has been ruled in a late case that upon an issue to try whether an act of bankruptcy has been committed a creditor is an incompetent witness, though he has not proved under the commission, Crooke v. Edwards, 1 Stark. R. 302. And see Adams v. Malkin, 3 Campb. 543.

*o* Rex v. Barnes, 1 Stark. R. 243. In this case it was also ruled that, although the probate of a will had been produced, the will itself could not be read in evidence upon the

mere production of it by the officer of the ecclesiastical court, without some indorsement upon it for the purpose of authentication.

*p* 1 Hawk. P. C. c. 49. *Of Fraudulent Bankruptcy*, s. 4. Ex parte James, 1 P. Wms. 610; where the Lord Chancellor said that a wife could not by the common law be a witness for or against her husband; and though the former statute, 21 Jac. 1. authorized the commissioners to examine the wife touching any concealments of the goods, effects, or estate, of the bankrupt, yet it did not extend to examining the bankrupt's wife touching his bankruptcy, or whether he had committed any act of bankruptcy, and how or when he became a bankrupt.

*q* As to commitments for not answering, &c. by the commissioners, see Rex v. Nathan, 2 Str. 880. Rex v. Perrott, 2 Burr. 1122. Rex v. Perrott, *Id.* 1216. Miller's case, 2 Black. R. 881. Langham's case, 2 Black. R. 919. Rex v. Pedley, 1 Leach 325. Ex parte Nowlan, 6 T. R. 118.

# BOOK THE FIFTH.

## OF OFFENCES WHICH MAY AFFECT THE PERSONS OF INDIVIDUALS OR PROPERTY.

### CHAPTER THE FIRST.

#### *Of Perjury and Subornation of Perjury.*

**PERJURY** by the common law appears to be a wilful false oath by one who, being lawfully required to depose the truth in any proceeding in a court of justice, swears absolutely in a matter of some consequence to the point in question, whether he be believed or not. (a) (1) Perjury by the common law.

1 Hawk. P. C. c. 69. s. 1. 3 Inst. 164. Com. Dig. Tit. Just. of Peace, B. 102. 5 Bac. Ab. *Perjury*.

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(1) This is an incorrect definition of perjury at common law. The definition in Hawkins, is "a wilful false oath, &c. in any procedure in a *course* of justice," not in a *court* of justice.—Many perjuries may be committed out of court; as in all cases where depositions, affidavits, &c. are taken out of court, and before magistrates. In such cases the perjuries may be properly said to be committed in a *course* of justice, though not in a *court* of justice.—Editor.

**MASSACHUSETTS.**—The remedy provided by the ninth section of the statute of 1794, c. 64, for the party injured, by an action of the case, against persons summoned as trustees who shall, upon their examinations, knowingly and wilfully swear falsely, does not depend upon a previous conviction of the other party for perjury; but the two remedies are concurrent and distinct, and one may be pursued independently of the other. 10 Mass. Rep. 253, *Forsyth v. Shaw*.

In the case of the Commonwealth *v. Knight*, 12 M. R. 274, the following points were decided. 1. That in an indictment for perjury, it is not necessary to allege that the witness was summoned to appear at the court, or that the false affirmation was in answer to a specific question. For every person who appears as a witness, and is duly sworn before a competent court, on the trial of an issue there depending, is "lawfully required to depose the truth."—(These words are made use of in the statute.)

2. It is sufficient to allege in such indictment, that the perjury was committed in the trial of an issue duly joined, without any express allegation that the cause of action was within the jurisdiction of the court.



Suborna-  
tion of per-  
jury by the  
common  
law.

Subornation of perjury by the common law is an offence in procuring a man to take a false oath amounting to perjury, who actually takes such oath. But it seems clear that if the person, incited to take such an oath, do not actually take it,

3. It is necessary that it should be alleged, or at least that it should appear in the indictment, that the facts, respecting which the testimony was given, were material to the issue on trial. If it is not averred in the indictment that the facts concerning which the defendant testified, were material on the trial, the court cannot consider them so, unless they clearly appear to be material from the other facts set forth in the indictment. 10 Mass. Rep. 274.

A case of perjury was tried at nisi prius in the county of Hampshire, before Parsons, C. J., in which the perjury alleged to have been committed, was in swearing falsely in an affidavit before a magistrate, intended to be used before a committee of the house of representatives. There was no order of the house to take the affidavit; but it was obtained by the party interested in the subject to be inquired into, of his own accord; and the affidavit was voluntarily given and taken before the magistrate. Upon these facts the Chief Justice ruled that there could be no legal or technical perjury in such a case; and the defendant was thereupon acquitted.—Editor.

CONNECTICUT.—In the case of Chapman v. Gillet, 2 Connecticut Rep. 40, which was an action of slander, it was decided that “the taking of a false oath, wilfully and corruptly, in any case where the administration of an oath is lawful, is perjury at common law.” This was a very interesting case, reserved upon a motion for a new trial for the consideration and advice of the nine judges in the supreme court of errors,—where it was also decided that “words charging a person with having given false evidence under an oath administered by a justice of the peace before a church convened for the purpose of administering discipline among its members, are actionable without an averment and proof of special damage.” Six of the judges were in favour of the plaintiff, and of the positions above stated; three of the judges were of a contrary opinion. Six of the nine judges gave the reasons of their opinions, at large. Much ingenuity and learning are displayed upon both sides of the question; and as the case is of great importance and some novelty, the perusal of it is recommended to the profession, more particularly in New England, where it has a particular application to the ecclesiastical usages and proceedings in that part of the United States. The arguments of the judges are too long to be inserted at large in a note, but the following is an outline of the case, made with a particular view to the nature of perjury in general, as stated, explained and applied in the case cited.

At the trial below, a verdict was recovered by the plaintiff. The only words proved to have been spoken by the defendant, were words charging the plaintiff with having taken a false oath before a meeting of the members of the church in an ecclesiastical society, acting according to the usages of this state, as an ecclesiastical tribunal for the administration of church discipline. The defendant moved the court to instruct the jury, that the words proved were not in themselves actionable; but the court instructed the jury that *they were actionable per se*; and for this misdirection the defendant moved for a new trial.

In support of the motion, the defendant's counsel stated the question to be, *whether a person who testifies falsely before an ecclesiastical tribunal, is indictable for perjury*; and they contended, that in order to make a false oath the subject of an indictment for perjury, it must be taken before a tribunal having

the person by whom he was so incited is not guilty of subornation of perjury; yet it is certain that he is liable to be punished, not only by fine, but also by infamous corporal punishment. (b)

b 1 Hawk. P. C. c. 69. s. 10. 5 Bac. Ab. *Perjury*, and the authorities there cited.

*civil power*, and must go to affect the *civil rights* of the party. 1 Hawk. c. 69. s. 3. They further argued, that a church in this state has no civil power; that it is merely a voluntary association of individuals, and that a false oath before a meeting of its members for discipline, can affect the civil rights of no one.

It was admitted by the counsel for the plaintiff, that if the taking a false oath before a church meeting cannot be perjury, the words in question were not of themselves actionable; but they contended that in all cases, in which the law recognizes the administration of an oath, it will make that oath efficacious; and the taking of a false oath is perjury. That the law recognizes the administration of an oath before an ecclesiastical tribunal is evident from these considerations:—First, it has been the immemorial usage before these respectable tribunals, to receive the testimony of witnesses *under oath*:—Secondly, an oath, in the case under consideration, is necessary to the investigation of truth, the attainment of justice, and the advancement of the best interests of religion. A church is a body, whose existence and powers, as such, are recognised by the laws of the state, and the being “in full communion with the church,” is a qualification for voting in a society meeting, equal to real or personal estate to a certain amount. It was also stated, that it had been decided by the superior court and the supreme court of errors in this state, in the case of *Lyman v. Wetmore*, Supreme Court of Errors, June term, 1795, that the taking of a false oath before an arbitration, is perjury.

In the principal case, the late learned and lamented Chief Justice Swift, delivered his opinion against granting a new trial, as follows. “Christianity is a part of the law of the land. We have no establishment of any denomination of christians; but all have, by law, the power of supporting and conducting public worship, in a manner conformable to their own sentiments. From time immemorial it has been the usage of churches of every denomination, to have ecclesiastical tribunals, who are invested with certain powers for their government, and the administration of discipline among their members.—These are necessary, not only for the promotion of religion, but for the peace and well being of civil society. In the exercise of their powers, these tribunals, by their sentences, can *directly* affect the spiritual rights of their members, and *indirectly* their civil rights. They may be said to be courts where justice is judicially administered. In the discharge of their duties, it is necessary that they should investigate the truth of facts by the testimony of witnesses. To enable them to do this, it is essential that they should have the power to examine witnesses upon oath; and it is understood to be the general practice for magistrates to administer oaths in such cases.”

“Here, then, are well known tribunals of ecclesiastical jurisdiction, who possess certain powers by common consent and immemorial usage, sanctioned by law, in the exercise of which it is necessary and proper for them to inquire into the truth of facts by testimony, and before whom it is necessary and proper for the civil magistrate to administer oaths. It is a sound principle, that where an oath can lawfully be administered, there false swearing shall be deemed perjury. There can be no reason to confine it to those tribunals only, whose decisions can affect *civil* rights: other rights may be equally im-

The false  
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be wilful,  
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\*The false oath must be wilful, and taken with some degree of deliberation; for if upon the whole circumstances of the case it shall appear probable, that it was owing rather to the weakness than perverseness of the party, as where it

portant, and equally deserving of protection. None will say that it is unlawful or improper to administer an oath before an ecclesiastical tribunal; for otherwise witnesses will not be under the obligations of an oath to speak the truth, at a time when their testimony may deeply affect the rights and the character of individuals. It appears to me, that justice and policy require, that these tribunals, acting within their proper jurisdiction, should have the same power as civil courts to investigate the truth; that the parties who may be subjected to their discipline, should be protected against false accusations by the punishment of witnesses who swear falsely; and that witnesses who are falsely charged with perjury in such cases, should have the means of defending their character by an action against the slanderer. To deny this, would be to encourage perjury and slander. No man could consider his character safe, as a party or witness before such tribunals; and it would tend greatly to lessen their respectability and usefulness to have it published to the world, that they are viewed in so unimportant a light by courts of law, that perjury might be committed before them with impunity, and their witnesses slandered without redress."

"But it is said, that we are incroaching on the province of the legislature; that we are making, not expounding law; and are adding a new offence to the criminal code; and a new head in the chapter of *actionable words*. But this is no innovation: it is only extending and applying principles already known, to new and analogous cases; a power which has ever been exercised by judicial tribunals; and which has produced the greatest improvements in jurisprudence. What would have been our condition, if judges at the outset, had been checked and restrained, by this timid doctrine, from the exercise of such an important power! We should yet have been in the infancy of black letter learning, and causes might have been decided by the ordeal, or wager of battle."

"It is a first principle, founded in the nature and fitness of things, that swearing falsely, when under an oath lawfully administered, is a crime. At first, perjury was confined to false swearing in a court of record; it was then extended to courts not of record. It has been decided in this court, that to charge a man with perjury before arbitrators, is actionable slander; and now by analogy, we extend the same principle to ecclesiastical tribunals. Here no new principle is introduced. We only apply a well known principle to similar cases. The same objection might have been made to extending it to arbitrators; but no one will now question the propriety and correctness of that decision; and I have no doubt that the doctrine now promulgated, will meet with the same approbation."

"I would not advise a new trial."

The two judges Edmond and Goddard, who dissented from the majority, and were in favour of a new trial, gave their reasons at large, which were in substance as follows: "If to take a false oath before a church meeting is an indictable offence, it must be on the ground that it is perjury at common law, or perjury by the statute of Connecticut." 1 Stat. Conn. tit. 127.

"That it cannot be perjury within the statute must be admitted, unless it can be shewn, that a church meeting is, in legal contemplation, not only a court with judicial powers, but a court of record. The statute extends to no

was occasioned by surprize, or inadvertency, or a mistake of the true state of the question, it cannot but be hard to make it amount to voluntary and corrupt perjury, which is of all crimes whatsoever the most infamous and detestable. (c)

c 1 Hawk. P. C. c. 62 s. 2.

other perjury than that which may be committed by a witness in giving "his deposition in any court of record or upon examination," without the unlawful procurement of others; or who, by the unlawful and corrupt procurement of others, shall "commit wilful and corrupt perjury in any matter or cause whatever, depending, or that shall be depending in suit and variance by any writ, action, bill, complaint or information in any court of record." That every church meeting is a court of record they were not prepared to say. The legislature, and "they only," have power "to institute and style judicatories and officers as they shall see necessary, for the government of the state." 1 Stat. Conn. tit. 42. c. 1. s. 4. This power has been exercised, as far as has hitherto been deemed expedient. But in the distribution of the power thus delegated, we find no mention of a church, or church meeting, as constituting a court or judicial tribunal, with authority to decide between parties, or among their own members, any matter of controversy, either in relation to their civil rights, their doctrines or their discipline."

"Of the wisdom or policy of such an omission it is not our province to decide. The fact, however, evinces a total destitution in church meetings, of all the powers incident to courts or officers intrusted with the execution of the laws; and at the same time furnishes evidence of the delicate nature of the subject, and the expediency of legislative interference."

"If, then, in the distribution of judicial powers, by the General Court or Assembly, churches or church meetings, have received no share, or have been vested with no authority judicially to decide any question of law, or matter of controversy, or to do any official act, required to be done, and necessary to the due execution of the laws, they must be considered as destitute of every requisite essential to a court. It follows, that a false oath voluntarily taken, (and no other than a voluntary oath can be taken before them,) although a gross immorality, is no more the crime of perjury punishable by the statute, than a false oath voluntarily taken in any other place, before any number of persons associated by covenant or agreement to pursue any measure for their common benefit or the general good.

"It remains to be enquired, whether the taking a false oath before a church meeting is perjury at common law. No definition of perjury by the common law, will be found so long, or so broad, as to embrace, or even countenance the position, that to take a false oath before a church meeting (such as has been described) is perjury in any sense of the word, recognized by the law."

The definitions of perjury, from 2 Hawk. 33, and Black. Com. vol. 4, p. 136, are then stated, and the following remarks from Blackstone, quoted. "The law takes no notice of any perjury, but such as is committed in some court of justice having power to administer an oath; or before some magistrate or proper officer, invested with a similar authority, in some proceeding relative to a civil suit, or a criminal prosecution; for it esteems all others unnecessary at least, and therefore will not punish the breach of them."

"But recurrence to authorities is unnecessary. No precedent has, or can be shewn in support of the proposition. The case of *Lyman v. Wetmore*,

A man may be indicted for perjury in swearing that he It has been said that no oath will amount to perjury, unless it be sworn absolutely and directly, and, therefore, that he who swears a thing according as he *thinks, remembers, or believes*, cannot, in respect of such an oath, be found guilty

does not bear on the question. There is no analogy between the powers and duties of arbitrators, and church meetings. The former are vested with powers to determine *civil rights*, and are sworn "faithfully to administer justice between the parties in the case submitted, or referred, according to law." 1 Stat. Conn. tit. 122. c. 3. s. 6.

"Not so with the latter. They have no uniform usage. They do not act under the common law rules in relation to the admission and examination of witnesses, nor consider them as obligatory; they are bound by no oath prescribed by law in relation to their proceedings; nor are they trusted, in any respect, as a court of law in the administration of justice." (A case is here stated in a note, in which, a question being put to an ecclesiastical counsel, whether in the admission of testimony, the counsel were governed by the rules of law, or to take the scripture for their rule, it was resolved, that the word of God was the rule by which they were to be governed.)

"But it is said church members have civil privileges, which others do not possess. When of full age, they may vote at society meetings, (tit. 151, c. 1. s. 7. and tit. 144. c. 1. s. 2.) By excommunication, a church meeting may deprive them of this right. But it is to be observed, that if after excommunication, a question should arise, whether the right to vote continued, upon the ground of a former right or qualification in point of property, before admission and after excommunication, the courts of law, and not a church meeting must decide it.

"From these considerations, it is inferred, that to take a false oath before a church meeting, though an act highly immoral in itself, does not amount to the crime of perjury within the statute, or by the common law; is not an indictable offence, and to charge a person with it, cannot expose the person charged to a criminal prosecution or punishment."

Upon the same side of the argument, it was added (among other important matter) by Goddard, J., that according to Coke, 3 Inst. p. 165, "that no old oath can be altered, or new oath raised, without an act of parliament; or any oath administered by any that hath not allowance by the common law, or by act of parliament;" and hence it was, that the commissioners concerning policies of insurance would not examine upon oath, because they had no warrant, either by the common law, or by any act of parliament; and therefore it was enacted, that it should be lawful for the said commissioners to examine upon oath any witnesses.

*Christian*, in his notes to Blackstone's Com. vol. 4, p. 137, says, "Where an oath is required by an act of parliament, but not in a judicial proceeding, the breach of that oath does not seem to amount to perjury, unless the statute enacts, that such oath, when false, shall be perjury, or shall subject the offender to the penalties of perjury." The same learned judge further adds,—"It is a part of the definition of perjury, that the testimony should be material to the issue or cause in question."—"If a man should be prosecuted for perjury before an ecclesiastical tribunal, their rules of evidence and modes of proceeding, are so different from those which prevail in a judicial tribunal, that judges and jurors might be much puzzled to ascertain, either what was the issue, or what testimony was material to support it; and having no rules of evidence by which they would judge of the materiality of the tes-



of perjury. (d) But De Grey, Ld. C. J., appears to have <sup>believes a</sup> laid down a different doctrine. (e) And Lord Mansfield, C. J., <sup>fact to be</sup> is stated to have said, "It is certainly true that a man may <sup>true.</sup> be indicted for perjury in swearing that he *believes* a fact to

d 3 Inst. 166.

e Miller's case, 3 Wils. 427. 2 Black. Rep. 831.

timony, resort must be had to the members of the church to prove what *they* judged material."

NEW YORK.—In the case of Jackson v. Humphrey, 1 Johns. Rep. 499. It was decided, that an oath administered in *Canada*, by a late judge of a county in the state of *New York*, was extra-judicial and of no validity. That a judge has no authority to administer an oath out of the jurisdiction of the state, and that the witness, in such case, could not be prosecuted for perjury.

In an action of slander for charging the plaintiff with having sworn falsely and committed perjury in swearing out an attachment, &c. before a justice of the peace, it was held, that as the statute authorized the justice to issue the attachment on satisfactory proof, it was left to his discretion to decide on the proof, and when he took the oath of the party, which was not legal evidence, this was held an error of judgment, and not an excess of jurisdiction, and the proceeding was therefore erroneous only and not void; and perjury may be assigned in an oath erroneously taken, especially while the proceedings remain unreversed. 10 Johns. Rep. 169. Van Strenberg v. Korts. 1 Vent. 181. 1 Sid. 148. Spencer, J., *contra*.

PENNSYLVANIA.—In order to constitute perjury, there must be "a lawful oath administered in some judicial proceeding." False swearing in a voluntary affidavit made before a justice of the peace before whom no cause is depending, is not perjury, nor can it be punished by indictment, although it is a very immoral and disgraceful transaction. Per Tilghman, C. J. in Shaffer, v. Kintzer, 1 Binn. Rep. 543.

A man who swears wilfully and deliberately to a matter that he rashly believes, but which he has no probable cause for believing, and which is false, is guilty of perjury. 6 Binn. Rep. 249. The Commonwealth v. Cornish. In this case, Tilghman, C. J. says, "It is contended that there can be no perjury where a man believes what he swears. But it appears to me that a position so extensive cannot be supported. He ought at least to have some probable cause for belief, unless the oath be taken under such circumstances of haste or surprise, as afford no opportunity of deliberation. If a man undertakes to swear to a matter of which he has *no knowledge*, he is perjured, although what he has sworn turns out to be true. 3 Inst. 166. Where a man was adjudged guilty of perjury for swearing to the value of goods which he never saw or knew, although his valuation was not incorrect. There is corruption in undertaking to swear positively to a thing of which you have little knowledge, and which you may know if you will take the trouble to inquire. And when there is this kind of corruption the law implies *malice*. It is objected, that it may be of dangerous consequence, if witnesses are convicted for swearing to what they believe to be true. On the other hand, it will be more dangerous, if they are to escape punishment who rashly and obstinately persist in a false oath, in a matter on which they will not take the pains to inform themselves. That the oath of Cornish (the defendant) was *absolute* and *false*, will not be denied. It was *wilful* also according to the legal import of that word, by which it is only understood that the oath is taken with



be true which he must know to be false.” (*f*) It is further said that upon this question being agitated in the Court of Common Pleas, all the Judges were unanimous that *belief* was to be considered as an absolute term, and that an indict-

*/ Peckey's case, 1 Leach, 327.*

some degree of deliberation, and not merely through *surprise* or *inadvertency*, or a mistake of the true nature of the question.” (3 Bac. Abr. 814. A.) Now here was great deliberation, or at least room for deliberation; for there was an interval of two days before the first and second oath; and the first was taken two days after the affray in which the defendant was shot. In cases where the oath was clearly false, I know no rule more reasonable, than to leave it to the jury to decide, whether there was any probable ground for mistake.” And in the same case, per Brackenridge, J. The question is, can a man be guilty of perjury who believes what he says to be the truth? Probable cause or reasonable ground of belief, in a prosecution in a course of justice, will exempt from damages. The want of probable cause or reasonable ground, *pari ratione*, will subject to the conviction of perjury. For the malice is an inference of law, from the want of probable cause or reasonable ground. I am not to be at the mercy of the *weakness* of a man; and the law will protect against the *weakness* as well as against the *actual wickedness* of him, who attacks my reputation by an oath in a court of justice. It is the same thing to me whether it was his weakness or actual malice and wickedness, that led him to take the oath.

“It interests the public that rash and unadvised swearing a crime upon another, should be restrained; and how can this be done if the only inquiry shall be, whether the weak man really thought that which he swore was true.” “It ought to be at a man's risque to undertake to swear positively under circumstances where he ought to have mistrusted his vision, and could not be certain as to what he undertook to say he positively saw.”

In the case *Respublica v. Robert Newell*, 3 Yeates' Reports, 407, it was decided that in an indictment for perjury in answering interrogations on a rule to shew cause why an attachment should not issue for a contempt, &c. in a civil suit, the interrogatories may be entitled as between the state and the party, and the perjury be assigned in the answers thereto, before the attachment actually issued. It was also decided that such indictment is sufficiently certain, by averring that the party was sworn *in due form of law*. After a conviction in this case, the following reasons were filed in arrest of judgment. 1. That the affidavit on which the perjury is assigned, is stated to be on an interrogatory filed between the Commonwealth and the defendant, on the part of the Commonwealth, without stating any proceeding on the part of the Commonwealth and the defendant, in which the said affidavit would be material. 2d. For that it is not stated that the defendant took an oath on the Holy Gospel of God, or in the presence of Almighty God, by uplifted hand. 3d. For that in the assignment of the perjury it is not stated that he did *falsely, corruptly* and *voluntarily* swear. 4. That the said indictment is insensible, &c. The opinion of the court was delivered by Smith, J. in which these objections are all overruled, and the motion in arrest of judgment denied. The opinion contains a statement of the reasons and authorities upon which it is founded, to which the reader must be referred.

The third reason in arrest of judgment was considered as most material, and the learned judge states at large the grounds and authorities upon which

ment might be supported upon such a statement. (g) But it has been holden that perjury cannot be assigned upon an assertion, the correctness of which depends upon the construction of a deed. (h)

g Anon. C. P. Mich. T. 1780. 1 Hawk. P. C. c. 69. s. 7. note (a), p. 88. (ed. 1795.)

h Rex v. Crespigny, cor. Kenyon, C. J. 1 Esp. 280.

it was overruled. He first goes into a comparison between the English statute of 5 Eliz. c. 9. and the statute of Pennsylvania; and then says, "the law is perfectly ascertained, that one may be guilty of perjury at common law, in respect of a false oath taken by him in his own cause, in answer to questions put to him in a court of law having power to purge him upon oath concerning his knowledge of the matters in dispute." 1 Rol. Ab. 40, pl. 15. 83, pl. 9. Cro. El. 609 So also in a court of equity. 1 Leon. 127. Cro. El. 135. 905. 1 Sid. 244. 1 Hawk. c. 69. s. 5. The precedents as to the terms *falsely*, *voluntarily* and *corruptly*, are then referred to, viz. Rex v. Oates, 5 St. Tri. 4 & 70. 3 St. Tri. 661. 10 St. Tri. 206. Tremain's pleas of the crown, there are thirteen precedents, from p. 136 to 167. Crown. Circuit Comp. 308 to 334 Clifts' Entries, 399. 401. 5 Mod. 343. Co. Entr. 164. 6. 357. a. On the other hand, in the same book, 165. 6, Rast. Entr. 481, the above mentioned terms are not used.

In *Officium Clerici Pacis*, fol. 87. there is an indictment resembling the present case. Again in West's Symbol, 119, 6. Sect. 160, a similar form occurs, and in the same book and page, Sect. 161. and in p. 138, Sect. 241. The result is, that at the common law the forms of indictments are not uniformly the same; but the words *falsely*, *corruptly* and *wilfully*, as applied adjectively or adverbially to the act of swearing, are mere expletives to swell the sentence, in the language of Lord Hardwicke. 1 Atky. 50. We find no adjudged case or dictum in the books, that such words are appropriate terms of art, descriptive of the crime of perjury, as *murdravit* in murder, &c. On the contrary, we find it laid down by the judges, that an indictment for perjury at common law, does not require so much certainty as on the statute, and that it need not be in a court of record, or matter material to the issue. 5 Mod. 348. 1 Sid. 106. In Cox's case (Leach 69) it was agreed by ten judges unanimously, that the word *wilfully* was not essentially necessary in an indictment for perjury at common law, though it was essential in an indictment for perjury on the Statute of 5 Eliz. c. 9, because the term *wilful* in the Statute, is a material description of the offence; still it must appear by the indictment that the oath was *wilfully false*. The indictment in this case in its conclusion, negatived by express averments, the truth of the oath, &c. viz. "that the said R. N. the day and year aforesaid, at C. aforesaid, by his own act and consent, and of his own most wicked and corrupt mind and disposition, in manner aforesaid, did *knowingly, falsely, wickedly, maliciously and corruptly* commit wilful and corrupt perjury," &c. though it was not averred, that the defendant did *falsely, corruptly and voluntarily* swear, &c.

According to a MS. report of the case United States v. Passmore, C. C. April, 1804, referred to in Wharton's Digest, p. 154, it was decided in that court, that the 8th section of the act of Congress of 1790, only relates to perjuries committed in judicial proceedings in the United States courts, and does not extend to all cases of perjury in depositions taken under the authority of the United States. And in United States v. Passmore, C. C. 4 Dall. 372, it was also decided that the act of 19th December, 1803. repealing the

The important requisites in the case of perjury appear to be these; *the false oath must be taken in a judicial proceeding, before a competent jurisdiction, and it must be material to the question depending.* (i)

[\*1754]

The oath  
must be  
false.

\*With respect to the falsity of the oath it should be observed that it has been considered not to be material whether the fact, which is sworn, be in itself true or false; for, howsoever the thing sworn may happen to prove agreeable to the truth, yet, if it were not known to be so by him who swears to it, his offence is altogether as great as if it had been false, inasmuch as he wilfully swears that he knows a thing to be true which at the same time he knows nothing of, and impudently endeavours to induce those before whom he swears to proceed upon the credit of a deposition, which any stranger might take as well as he. (k)

The oath

The oath must be taken either in a judicial proceeding,

i By Lord Mansfield, C. J., in *Rex v. Aylett*, 1 T. R. 69.

k 1 Hawk. P. C. c. 69. s. 6. *Rex v. Edwards, cor. Adams, B., Shrewsbury Lent Ass.*

1764; and subsequently considered of by the Judges, MS. And see per Lawrence, J., in *Rex v. Mawbey and others*, 6 T. R. 619.

bankrupt law, was a bar to any prosecution for perjury before the commissioners, committed previous to the passing of the repealing act. For this position the counsel for defendant cited 1 W. Black Rep. 451. 1 Hale, 291. 525. 1 Hawk. 306. 4 vol. U. S. Laws, 523. 202. Dall. (District Attorney) contended, 1st. that notwithstanding the repealing act, the perjury charged was indictable, under the bankrupt law, as an incident to the execution of the commission,—and cited U. S. Laws, vol. 5, 61, s. 21. 6 Bac. Abr. 384. 390. 2 Leach, 810. Co. B. L. 7. 5 Geo. II. c. 30, s. 44. 6 vol. 95, s. 14. 5 vol. 238. 6 vol. 93. 1 vol. 113, s. 32. 2 Hawk. 87. c. 69, s. 4, and numerous other books. Also 1 Hawk. 306. Bro. Abr. 203. 1 Hale, 291. 525. 2 Hale, 190. 2d. That the perjury charged was indictable independent of the bankrupt law, upon the general penal act, (1 vol. 108,) inasmuch as the provisions of the bankrupt law do not create the offence, are affirmative, and not repugnant; and with respect to the punishment, are cumulative. Cowp. 297. 2 Hale, 705. 4 Burr. 2026. 23 Geo. II. c. 13. Leach, 253. 1 Hawk. 306. B. 1. c. 40. s. 5. Leach, 715. 2 Hale, 191, 2.

Two defendants cannot be joined in an indictment for perjury. *Respublica v. Goss & al.* 2 Yeates' Rep. 47.—adjudged 2 Str. 921. 2 Burr. 985.—and on an indictment for perjury on a trial at *nisi prius*, the *postea* must be produced in evidence. *Respublica v. Goss & al.* 2 Yeates, 479.

On an indictment for perjury, the day on which the offence was committed must be precisely stated. *United States v. Bowman*, C. C. April, 1809. MS. Reports, referred to in Wharton's Dig. 155.

In the case of *Kramer v. The Commonwealth*, in error, it was decided that the courts of Quarter Sessions for this state have jurisdiction of perjury. Also, that persons convicted of perjury are liable to fine and imprisonment at hard labour, but not to any particular kind of treatment as to diet or discipline. A sentence therefore which adjudges that the convict shall be confined, *fed, clothed and treated* as the law directs, is erroneous. 3 Binn. Rep 577.

or in some other public proceeding of the like nature, where-  
in the king's honour or interest are concerned; as, before  
commissioners appointed by the king to inquire of the for-  
feitures of his tenants, or of defective titles wanting the sup-  
ply of the king's patents. But it is not material whether the  
court, in which a false oath is taken, be a court of record or  
not, or, whether it be a court of common law, or a court of  
equity, or civil law, &c., or whether the oath be taken in the  
face of the court, or out of it before persons authorized to ex-  
amine a matter depending in it; as, before the sheriff on a  
writ of inquiry, &c.; or whether it be taken in relation to the  
merits of a cause, or in a collateral matter; as, where one  
who offers himself to be bail for another, swears that his sub-  
stance is greater than it is. (l) But neither a false oath in a  
mere private matter, as in making a bargain, &c., nor the  
breach of a promissory oath, whether public or private, are  
punishable as perjury. (m)

must be  
taken in a  
judicial  
proceeding.

In a case where perjury was assigned upon an affidavit of  
an attorney of the Court of King's Bench, made in answer  
\*to a charge exhibited against him in a summary way, for [\*1755]  
having in his possession blank pieces of paper with affidavit  
stamps, and the signatures of a master extraordinary in chan-  
cery and another person at the bottom of the papers, an ob-  
jection was taken in arrest of judgment that the indictment  
did not shew that the affidavit of the defendant was made in  
any legal proceeding. It was urged that the court had no  
right to call on the defendant summarily to answer any com-  
plaint against him merely because he was an attorney, un-  
less in a case touching the defendant's office as an attorney,  
in his conduct towards some of the suitors of the court, or for  
a breach or contempt of some rule or order of the court, or  
for some matter touching the proceedings or process of the  
court, none of which were stated; or if the paper found in  
the defendant's custody could have been the object of a sum-  
mary inquiry, (not having been used or attempted so to be,  
nor having a proper stamp) it could only have been in the  
Court of Chancery, where the paper could have been used, if  
at all, and not in the Court of King's Bench, wherefore all  
the proceedings respecting it were *coram non judice*, and  
could not be the subject of an indictment for perjury. But  
this objection was afterwards abandoned. (n)

It has been doubted, whether a false oath taken in Doc-  
tors' Commons, for the purpose of obtaining a *marriage*  
*licence*, amounts to perjury. (o) And the same doubt was  
entertained in a subsequent case, where the defendant was

l 1 Hawk. P. C. c. 69. s. 3. 5 Bac. Ab. Perjury, (A).

m *Id. Ibid.*

n Rex v. Crossley, 7 T. R. 317.

o Alexander's case, O. B. 1767. 1 Leach

63. The point was submitted to the consid-  
eration of the twelve Judges, and several  
times agitated; but the result was not com-  
municated, as the prisoner died in Newgate.

indicted for perjury in an affidavit in Doctors' Commons, in order to obtain a licence to marry one C. Hill, spinster, to which he swore that he knew no lawful impediment, whereas in truth and in fact he knew she was the wife of another man. (p)

[\*1756] \*As a suit will be abated by the death of a co-plaintiff, unless the death be suggested according to the statute 8 and 9 Wm. III. c. 11. s. 6., it has been ruled that if a co-plaintiff die, after issue joined, a trial without such suggestion on the record would be *extra-judicial*, and that no perjury could be assigned upon any false evidence given at such trial. (q)

And it must  
be taken  
before a  
competent  
jurisdic-  
tion.

The oath must be taken before a competent jurisdiction, that is, before some person or persons lawfully authorized to administer it. So that a false oath taken in a court of requests, in a matter concerning lands, has been holden not to be indictable, that court having no jurisdiction in such cases. (r) And it seems clear, that no oath whatsoever taken before persons acting merely in a private capacity, or before those who take upon them to administer oaths of a public nature, without legal authority for their so doing, or before those who are legally authorized to administer some kinds of oaths, but not those which happen to be taken before them, or even before those who take upon them to administer justice by virtue of an authority seemingly colourable, but in truth unwarranted and merely void, can ever amount to perjuries in the eye of the law, because they are of no manner of force, but are altogether idle. (s)

[\*1757] \*commissioners whose commission at the time is in strictness determined by the demise of the king is perjury, if taken before such time as the commissioners had notice of the demise; for it would be of the utmost ill consequence in such case to make their proceedings wholly void. (t)

The oath  
must be  
material to  
the ques-  
tion de-  
pending.

The oath must be material to the question depending: for if it be wholly foreign from the purpose, or altogether immaterial, and neither in any way pertinent to the matter in question, nor tending to aggravate or extenuate the damages, nor likely to induce the jury to give the readier credit

p Woodman's case, O. B. 1769. 1 Leach 64 note (a). The point appears to have been submitted also in this case to the consideration of the twelve Judges; but their opinion was not publicly communicated. In 3 Chit. Crim. L. 713, a precedent is given of an information by the Attorney-General for a misdemeanor in procuring a marriage with a minor, by false allegations; and in the note (u), it is said, "It seems doubtful whether an indictment for perjury could have been supported in this case; but it seems most probable that it might." And 1 Leach 63. is referred to.

q Rex v. Cohen, 1 Stark. P. 111

r Baston v. Gouch, 3 Salk. 269.

s 1 Hawk. P. C. c. 69. s. 4. and the authorities there cited; and 4 Black. Com. 157, where it is said "it is much to be questioned how far any magistrate is justifiable in taking a voluntary *affidavit* in any extra-judicial matter, as is now too frequent upon every petty occasion, since it is more than possible, that by such idle oaths a man may frequently *in foro conscientie* incur the guilt, and at the same time evade the temporal penalties of perjury."

t 1 Hawk. P. C. c. 69. s. 4. 5 Fac. 45. Perjury, (A).

to the substantial part of the evidence, it cannot amount to perjury, because it is wholly idle and insignificant; as, where a witness introduces his evidence, with an impertinent preamble of a story concerning previous facts, not at all relating to what is material, and is guilty of a falsity as to such facts. (u) And it appears to have been determined, that where a witness being asked by a judge whether A. brought a certain number of sheep from one town to another all together, answered, that he did so, whereas in truth A. did not bring them all together; but part at one time and part at another; yet such witness was not guilty of perjury, because the substance of the question was, whether A. did bring them at all or not, and the manner of bringing them was only a circumstance. And that upon the same ground where a witness, being asked whether a particular sum of money were paid for two things in controversy between the parties, answered that it was, whereas, in truth, it was paid only for one of them by agreement, such witness ought not to be punished for perjury; because, as the case was, it was not material whether the sum were paid for one or both. And it is also said to have been resolved, that a witness who swore that a man drew his dagger, and beat and wounded J. S., whereas in truth he beat him with a staff, \*was not guilty of perjury, because the beating only was [\*1758] material. (x)

But upon these decisions it is remarked, that perhaps in all these cases it ought to be intended, that the question was put in such a manner, that the witness might reasonably apprehend that the sole design of putting it was to be informed of the substantial part of it, which might induce him through inadvertency to take no notice of the circumstantial part, and give a general answer to the substantial; for otherwise, if it appear plainly that the scope of the question was to sift him as to his knowledge of the substance, by examining him strictly concerning the circumstances, and he give a particular and distinct account of the circumstances which afterwards appears to be false; surely he cannot but be guilty of perjury, inasmuch as nothing can be more apt to incline a jury to give credit to the substantial part of a man's evidence, than his appearing to have an exact and particular knowledge of all the circumstances relating to it. (y) And it is spoken of as a reasonable opinion, that a witness may be guilty of perjury in respect of a false oath concerning a mere circumstance, if such oath have a plain tendency to corroborate the more material part of the evidence; as if, in trespass for spoiling the plaintiff's close with the defendant's sheep, a witness swears that he saw such a number of the de-

u *Rex v. Griep*, 1 *Ld. Raym.* 256. 5 *Bac.* P. C. c. 69. s. 8.

Ab. *Perjury*, (A).

y 1 *Hawk.* P. C. c. 69. s. 8.

x 2 *Roll.* 41, 42, 369. *Hetl.* 97. 1 *Hawk.*



defendant's sheep in the close; and being asked how he knew them to be the defendant's, swears that he knew them by such a mark, which he knew to be the defendant's mark, whereas, in truth, the defendant never used any such mark. (x) And it appears to have been holden not to be necessary that it should appear to what degree the point in which a man is perjured was material to the issue, and that it will be sufficient if the point were circumstantially material. (a)

[\*1759] \*And still less is it necessary that the evidence be sufficient for the plaintiff to recover upon, since evidence may be very material, and yet not full enough to prove directly the point in question. (b) In a modern case where A. advanced money to B. on two distinct mortgages, upon one of which the security was insufficient, and B. assigned the equity of redemption in both to C., who assigned the insufficient estate to an insolvent, and filed a bill against A. to redeem the other, to which bill A. put in his answer, and therein denied having had notice of the assignment to the insolvent; it was holden that the notice was a material fact upon which perjury might be assigned. (c)

A man may be perjured by an oath taken in his own cause.

But a false verdict does not come under the notion of perjury.

It is not necessary that the false oath were credited.

False oath  
[\*1760] indictable in some cases, though not assignable as perjury.

It should be observed, that a man may be as much perjured by an oath taken by him in his own cause, either in an answer in chancery, or in an answer to interrogatories concerning a contempt, or in an affidavit, &c. as by an oath taken by him as a witness in the cause of another person. (d) But the oath must be taken by a person sworn to depose the truth; and a false verdict does not come under the notion of perjury, because the jurors do not swear to depose the truth; but only to judge truly of the depositions of others. (e)

A further point of general application may be mentioned, namely, that it appears not to be important whether the false oath were credited or not, or whether the party in whose prejudice it was taken were in the event any ways damaged by it; for the prosecution is not grounded on the damage to the party, but on the abuse of public justice. (f)

In some cases, where a false oath has been taken, the party may be prosecuted by indictment at common law, though the offence may not amount to perjury. Thus it appears to have been holden, that any person making or knowingly using any false affidavit taken abroad, (though a perjury could not be assigned on it here) in order to mislead our courts of justice is punishable by indictment as for a misdemeanor: and Lord Ellenborough, C. J. said, "that he had not the least doubt, that any person making use of a false instrument in order to

*z* 5 Bac. Ab. *Perjury*, (A). 1 Hawk. P. C. c. 69. s. 8.

*a* *Rex v. Griepe*, 1 Ld. Raym. 258.

*b* *Reg. v. Rhodes and Cole*, 2 Ld. Raym. 887.

*c* *Rex v. Pepys cor. Kenyon*, C. J., Peake,

N. P. R. 138.

*d* 1 Hawk. P. C. c. 69. s. 5. 5 Bac. Ab. *Perjury* (A).

*e* *Id. Ibid.*

*f* 1 Hawk. P. C. c. 69. s. 9. 5 Bac. Ab. *Perjury*, (A).

prevent the course of justice was guilty of an offence punishable by indictment." (g)

— We may now proceed to consider the statute 5 Eliz. c. 9. and other statutes which relate to the offence of perjury.

The statute 5 Eliz. c. 9. (made perpetual by 29 Eliz. c. 5. s. 2. and 21 Jac. I. c. 28. s. 8.) enacts (by s. 3.) "that all and every such person and persons which shall unlawfully and corruptly procure any witness or witnesses by letters, rewards, promises, or by any other sinister and unlawful labour or means whatsoever, to commit any wilful and corrupt perjury, in any matter or cause whatsoever now depending, or which hereafter shall depend in suit and variance, by any writ, action, bill, complaint or information, in any wise touching or concerning any lands, tenements or hereditaments, or any goods, chattels, debts or damages, in any of the courts before mentioned, (h) or in any of the queen's majesty's courts of record or any leet, view of frank pledge or law-day, ancient demeane-  
\*court, hundred court, court baron, or in the court or courts of the stannary in the counties of *Devon* and *Cornwall*; or shall likewise unlawfully and corruptly procure or suborn any witness or witnesses, which shall be sworn to testify in *perpetuam rei memoriam*; that then every such offender or offenders shall for his, her or their said offence, being thereof lawfully convicted or attainted, lose and forfeit the sum of forty pounds."

The fourth section enacts, that "if it happen any such offender or offenders, so being convicted, or attainted as aforesaid, not to have any goods or chattels, lands or tenements, to the value of forty pounds, that then every such person so being convict or attainted of any of the offences aforesaid, shall for his or their said offence suffer imprisonment by the space of one half-year, without bail or main-prize, and to stand upon the pillory the space of one whole hour, in some market town, next adjoining to the place where the offence was committed, in open market there, or in the market town itself where the offence was committed."

The fifth section enacts, "That no person or persons, being so convicted or attainted, be from thenceforth received as a witness to be deposed and sworn in any court of record (within *England*, *Wales*, or the marches of the same,) until such time as the judgment given against the said person or persons shall be reversed by attain or otherwise; and that, upon every such reversal, the parties grieved to recover his or their damages against all and every such person and persons as did

Statutes relating to perjury.

5 Eliz. c. 9. s. 3. Procuring any witness to commit perjury in any matter in suit, by writ, &c. concerning any lands, goods, &c. or when sworn in *perpetuam rei memoriam* punishable by forfeiture of 40*l*.

S. 4. Such offender not having goods, &c. to the value of 40*l*. to suffer imprisonment, and stand in the pillory.

S. 5. Persons convicted not to be received as witnesses until judgment reversed.

g *Omealy v. Newell*, 8 East. 304.

h *Viz.* (as in s. 1.) "the king's Courts of Chancery, the Star Chamber, the Whitehall, or elsewhere within any of the king's dominions of *England* or *Wales*, or the marches of the same, where any person or persons have or from thenceforth should have autho-

rity by virtue of the king's commission, patent or writ, to hold plea of land, or to examine, hear or determine any title of lands, or any matter or witnesses concerning the title, right or interest of any lands, tenements, or hereditaments."

procure the said judgment so reversed to be first given against them or any of them, by action or actions to be sued upon his or their case or cases, according to the course of the common laws of this realm."

S. 6. Persons committing perjury to forfeit 20l., and to be imprisoned for six months; and their oath not to be received in any court of record until judgment reversed.

The sixth section enacts, "That if any person or persons either by the subornation, unlawful procurement \*sinister persuasion or means of any others, or by their own act, consent, or agreement, wilfully and corruptly commit any manner of wilful perjury, by his or their deposition in any of the courts before-mentioned, or being examined *ad perpetuam rei memoriam*, that then every person or persons so offending, and being thereof duly convicted or attainted by the laws of this realm, shall for his or their said offence lose and forfeit twenty pounds. and to have imprisonment by the space of six months without bail or main-prize; and the oath of such person or persons so offending from thenceforth not to be received in any court of record within this realm of *England* or *Wales*, or the marches of the same, until such time as the judgment given against the said person or persons shall be reversed by attaint or otherwise: and that upon every such reversal the parties grieved to recover his or their damages against all and every such person and persons as did procure the said judgment so reversed to be given against them or any of them, by action or actions to be sued upon his or their case or cases according to the course of the common laws of this realm."

S. 7. And if such offenders have not goods to the value of 20l., they are to be set in the pillory, and have their ears nailed; and to be disabled from being witnesses until judgment reversed.

[\*1763] Disposal of forfeitures.

Trial of offences.

The seventh section enacts, "That if it happen the said offender or offenders so offending not to have any goods or chattels to the value of twenty pounds. that then he or they to be set on the pillory in some market-place within the shire, city, or borough, where the said offence shall be committed, by the sheriff or his ministers, if it shall fortune to be without any city or town corporate; and if it happen to be within any such city or town corporate, then by the said head officer or officers of such city or town corporate, or by his or their minister, and there to have both his ears nailed, and from thenceforth to be discredited and disabled for ever to be sworn in any of the courts of record aforesaid, until such time as the judgment shall be reversed, and thereupon to recover his damages in manner and form before-mentioned."

\*By the further provisions of the statute it is enacted, that one moiety of the said forfeitures shall be to the king, and the other moiety to such person as shall be grieved, hindered, or molested by reason of any of the offences before-mentioned. that will sue for the same, &c.; and that as well the judge and judges of every such of the said courts where any such suit shall be, and whereupon any such perjury shall be committed, as also the justices of assize and gaol delivery, and justices of peace at their quarter sessions, both within the liberties and without, may inquire of, hear and determine all offences against

the said act. (i) And it is provided, that the said act shall no way extend to any spiritual or ecclesiastical court, but that every such offender, as shall offend in term as aforesaid, shall be punished by such usual and ordinary laws as are used in the said courts. (k) And it is also provided, that the said statute shall not restrain the authority of any judge having absolute power to punish perjury before the making thereof; but that every such judge may proceed in the punishment of all offences punishable before the making of the said statute, in such wise as they might have done and used to do to all purposes, so that they set not on the offender less punishment than is contained in the said act. (l)

The important statute relating to the punishment of perjury is the 2 Geo. II. c. 25. s. 2. which, in order the more effectually to deter persons from committing wilful and corrupt perjury, or subornation of perjury, enacts, “That besides the punishment already to be inflicted by law for so great crimes, it shall and may be lawful for the court or judge, before whom any person shall be convicted of wilful and corrupt perjury, or subornation of perjury, according to the laws now in being, to order such person to be sent to some house of correction within the same county, for a time not exceeding seven years, there to be kept to \*hard labour during all the said time, or otherwise to be transported to some of his majesty’s plantations beyond the seas, for a term not exceeding seven years, as the court shall think most proper; and thereupon judgment shall be given, that the person convicted shall be committed or transported accordingly over and beside such punishment as shall be adjudged to be inflicted on such person, agreeable to the laws now being; and if transportation be directed, the same shall be executed in such manner as is or shall be provided by law for the transportation of felons; and if any person so committed or transported shall voluntarily escape or break prison, or return from transportation before the expiration of the time for which he shall be ordered to be transported, as aforesaid, such person, being thereof lawfully convicted, shall suffer death as a felon, without benefit of clergy, and shall be tried for such felony in the county where he so escaped, or where he shall be apprehended.”

Besides these statutes, there are a great number relating to perjury committed in particular proceedings and transactions, and by particular persons, some of which it will be proper to notice in this place. Enactments of this description are to be met with in so many and such various statutes that it is not presumed but that many of them have not come within the author’s observation.

It should first be mentioned that the false affirmation, or

The act is not to extend to spiritual courts.

Nor to restrain other punishment of perjury.

2 Geo. II. c. 25. s. 2. Perjury and subornation of perjury made further punishable by imprisonment and hard labour, in the house

[\*1764] of correction; or by transportation for seven years.

Offenders so committed or transported, escaping or breaking prison, or returning from transportation, to suffer death without benefit of clergy.

Statutes relating to perjury committed in particular proceedings, &c. and by particular persons.

False affir-

i S. 8, 9.  
k S. 11.

l S. 13.

declarations of  
Quakers.

22 Geo. II.  
c. 46. s. 36.

[\*1765]

Quakers  
not to give  
evidence in  
criminal  
cases.

Perjury in  
respect of  
life annui-  
ties.

[\*1766]

Perjury in  
respect of

declaration, of any of the people called *Quakers*, made instead of an oath, will subject the party to the penalties of perjury, by the enactments of several statutes; 7 and 8 W. III. c. 34. 8 Geo. I. c. 6. and 22 Geo. II. c. 46. The latter statute, (by s. 36.) enacts, “That in all cases wherein by an act or acts of parliament now in force, or hereafter to be made, an oath is or shall be allowed, authorized, directed or required, the solemn affirmation or declaration of any of the people called *Quakers*, in the form prescribed by the said act made in the eighth year of his said \*late majesty’s reign, (*m*) shall be allowed and taken instead of such oath, although no particular or express provision be made for that purpose in such act or acts; and all persons who are or shall be authorized or required to administer such oath shall be and are hereby authorized and required to administer the said affirmation or declaration; and the said solemn affirmation or declaration so made as aforesaid shall be adjudged and taken, and is hereby enacted and declared to be of the same force and effect, to all intents and purposes, in all courts of justice, and other places, where by law an oath is or shall be allowed, authorized, directed or required, as if such *Quaker* had taken an oath in the usual form; and if any person making such affirmation or declaration, shall be lawfully convicted of having wilfully, falsely and corruptly affirmed and declared any matter or thing, which, if the same had been deposed in the usual form, would have amounted to wilful and corrupt perjury, every person so offending shall incur and suffer the like pains, penalties and forfeitures, as by the laws and statutes of this realm are to be inflicted on persons convicted of wilful and corrupt perjury.” But, (by s. 37.) it is provided, “That no *Quaker* shall by virtue of this act be qualified or permitted to give evidence in any criminal cases, or to serve on juries, or to bear any office or place of profit in the government.”

The statutes for enabling the commissioners of the national debt to grant life-annuities usually contain clauses relating to perjury: as the 48 Geo. III. c. 142. s. 26., and the 52 Geo. III. c. 129. s. 7. The clause of the latter statute is in the following form: “That if any person in any affidavit or affirmation to be taken under the provisions of this act, shall wilfully or corruptly swear or affirm any matter or thing which shall be false or untrue, every such person so offending, and being thereof duly convicted, \*shall be and is hereby declared to be subject and liable to such pains and penalties as by any laws now in force any persons convicted of wilful and corrupt perjury are subject and liable to.”

The statute 51 Geo. III. c. 15. which authorized an issue of *exchequer bills* to commissioners for the purpose of their

*m* That form was as follows:—“I, A. B. do solemnly, sincerely, and truly declare and affirm.”



making advances for the assistance and accommodation of *exchequer bills.* manufacturers, directs certain oaths to be administered; and then (by s. 10.) enacts, “That if any person or persons upon examination upon oath or affirmation before the said commissioners respectively, or if any person or persons making any such affidavit or deposition as before-mentioned, shall wilfully and corruptly give false evidence, or shall in such affidavit or deposition wilfully and corruptly swear, affirm or allege any matter or thing which shall be false or untrue, every such person or persons so offending, and being thereof duly convicted, shall be and is and are hereby declared to be subject and liable to such pains and penalties as by any law now in being persons convicted of wilful and corrupt perjury are subject and liable to.”

Many of the statutes relating to the duties of excise and customs contain clauses of a similar kind; as the 42 Geo. III. c. 94. s. 17. and 56 Geo. III. c. 103. s. 23. in respect of the drawbacks and allowances upon paper, pasteboard, &c.; and the 55 Geo. III. c. 113. s. 6. and 56 Geo. III. c. 108. s. 7. in respect of the duties and drawbacks upon plate-glass, &c. The 46 Geo. III. c. 112. s. 3. contains a general provision on the subject of the excise; and, after reciting that by the several acts relating to his majesty's duties of excise, oaths are required to be taken in manner therein mentioned, and that it was expedient to make such provision as thereafter mentioned, for the punishment of persons wilfully taking a false oath, in any of the cases in which an oath is by any such acts directed or required to be taken, it enacts, “That any person or persons who shall be convicted of wilfully taking a false oath in any of the cases in which \*an oath is by any act or acts of parliament relating to the [\*1767] duties of excise directed or required to be taken, shall be liable to the pains and penalties to which persons are liable for wilful and corrupt perjury.” The statute 49 Geo. III. c. 46. s. 2. with respect to oaths taken before the principal officers of the customs in *America* and the *West Indies*, enacts, “That if any person or persons whomsoever shall be convicted of making a false oath touching any of the facts directed or required by this act to be testified on oath, or of giving false evidence on his, her, or their examination on oath as aforesaid, by or before any collector and comptroller of the customs, of, at, or belonging to any port in the *West Indies*, or *America*, or either of them, or such other person or persons appointed as aforesaid in conformity to the directions of this act, such person or persons so convicted as aforesaid shall be deemed guilty of perjury, and shall be liable to the pains and penalties to which persons are liable for wilful and corrupt perjury.”

The statute 43 Geo. III. c. 56. entitled, “An act for regulating the vessels carrying passengers from the United King- *Perjury in respect to passengers*



to foreign  
settle-  
ments.

dom to his majesty's plantations and settlements abroad, or to foreign parts. with respect to the number of such passengers," enacts, (by s. 20.) "That if any person taking any oath by this act authorized or required to be taken, shall thereby commit wilful perjury, or if any person shall unlawfully procure or suborn any person to take any oath by this act authorized or required to be taken, whereby such person shall commit wilful perjury, every such person shall incur and suffer the like pains and penalties as are by law inflicted upon persons committing wilful and corrupt perjury, or subornation of perjury, in Great Britain and Ireland respectively."

Perjury re-  
lating to  
the stamp  
duties.

[\*1768]

The last stamp act, 55 Geo. III. c. 184. s. 53. contains a general provision in respect of oaths relating to the stamp duties; and enacts, "That all and every person and persons before whom any affidavit or solemn affirmation is or \*shall be required or directed to be made by this or any former or future act of parliament relating to any stamp duties, shall be, and they are hereby authorized to take the same and administer the proper oath or affirmation for that purpose; and if any person making any such affidavit or affirmation shall knowingly and wilfully make a false oath or affirmation of or concerning any of the matters to be therein specified and set forth, every person so offending and being thereof lawfully convicted, shall be subject and liable to such pains and penalties as by any law now in force, persons convicted of wilful and corrupt perjury, are subject and liable to." The statute 54 Geo. III. c. 133, "an act for enabling the commissioners of stamps to make allowances for spoiled stamps on policies of assurance, and for preventing frauds relating thereto," enacts, (by s. 13.) "That if any person making any such affidavit or affirmation as aforesaid, shall knowingly and wilfully make a false oath or affirmation, of or concerning any of the matters to be therein specified or set forth, every person so offending, and being thereof lawfully convicted, shall be subject and liable to such pains and penalties as by any law now in force persons convicted of wilful and corrupt perjury are subject and liable to."

Perjury re-  
lating to  
naval  
stores, &c.

The statute 39 and 40 Geo. III. c. 89. entitled, "An act for the better preventing the embezzlement of his majesty's naval, ordnance and victualling stores," enacts, (by s. 36.) "That if any person upon examination on oath or affirmation before any commissioners of the navy, ordnance or victualling respectively, or before any justice of the peace in *Great Britain*, in any matter relating to the execution of this act, shall wilfully and corruptly give false evidence, or shall, in any information or deposition sworn, or affirmation taken in writing before any such commissioner or justice, wilfully and corruptly swear or affirm any matter or thing which shall be false or untrue, every such person so offending, and being thereof lawfully convicted, shall be and is hereby declared to be

subject and liable to the \*like pains and penalties as any persons convicted of wilful and corrupt perjury are by any law now in force subject and liable to."

The statute 55 Geo. III. c. 157., by which the courts of law and equity in Ireland were empowered to grant commissions for taking affidavits in all parts of Great Britain, enacts, (by s. 8.) "That every person who shall in *England or Scotland*, be sworn or deposed, and examined as a witness, or sworn or deposed to the truth of any answer or plea or affidavits before any officer or officers who shall be appointed under the authority of this act for taking the same, and who shall, in his or her answer, plea or affidavit, wilfully swear or depone falsely, shall be deemed guilty of perjury, and shall incur and be liable to the same pains and penalties as if such person had wilfully sworn or deposed falsely in the open court, wherein the suit in which such oath was so taken then depended."

Perjury in affidavits, &c. for the Irish courts.

The statute 55 Geo. III. c. 60. relating to the execution of letters of attorney, and wills of petty officers, seamen, and marines in the navy, enacts, (by s. 19.) "That if any person or persons shall wilfully and knowingly falsely make oath or affirmation to any of the matters hereinafore directed to be verified on oath or affirmation, or suborn any other person or persons so to do, every such person or persons so offending shall be subject and liable to the same pains, penalties and forfeitures as persons guilty of wilful and corrupt perjury, or subornation of perjury, are by any law or laws now in force subject and liable to." The 57 Geo. III. c. 127. s. 4., in order to bring into one act the several provisions made for the prevention and punishment of the crimes of personation and forgery, for the purpose of obtaining prize-money, enacts, "That if any person or persons shall willingly and knowingly take a false oath to obtain the probate of any will or wills, or to obtain letters of administration, in order to receive or to enable any \*other person to receive any wages, pay, prize-money, bounty-money, pension-money or other allowances of money due or supposed to be due for or in respect of the services of any such officer, seaman, marine or other person as aforesaid, performed or supposed to have been performed on board of any ship or vessel of his majesty, his heirs, &c." such offenders shall be deemed guilty of felony without clergy.

Perjury relating to the wills and letters of attorney of seamen and marines.

[\*1770]

The mutiny acts 55 Geo. III. c. 108., 56 Geo. III. c. 10. and 57 Geo. III. c. 12., contain the following clause, (s. 144.) "That any person taking a false oath in any case wherein an oath is required to be taken by this act, shall be deemed guilty of wilful and corrupt perjury, and being thereof duly convicted, shall be liable to such pains and penalties as by any laws now in force any persons convicted of wilful and corrupt perjury are subject and liable to." And with respect to

Perjury by the mutiny acts :

And in naval courts-martial.

naval courts-martial, the 22 Geo. II. c. 35. s. 17. enacts, "That all and every person and persons who shall commit any wilful perjury, in any evidence or examination upon oath at any such court-martial, or who shall corruptly procure or suborn any person to commit such wilful perjury, shall and may be prosecuted in his majesty's court of king's bench, by indictment or information; and every issue joined in any such indictment or information shall be tried by good and lawful men of the county of *Middlesex*, or such other county as the said Court of King's Bench shall direct; and all and every person and persons, being lawfully convicted upon any such indictment or information, shall be punished with such pains and penalties, as are inflicted for the like offences respectively by the 5 Eliz. c. 9. and 2 Geo. II. c. 25."

Perjury relating to quarantine.

[\*1771]

The statutes 45 Geo. III. c. 10. s. 57., and 46 Geo. III. c. 98. s. 10., relate to oaths taken on the subject of *quarantine*. The latter statute enacts, "That in all cases wherein, by virtue and in pursuance of this act, or any other now \*in force, or hereafter to be made touching quarantine, any examinations or answers shall be taken or made upon oath, the person who shall be authorized and required to take such examinations and answers shall, and shall be deemed to have full power and authority to administer such oaths; and if any person who shall be so interrogated or examined, shall wilfully swear falsely to any matter, concerning which such persons shall depose or make oath on such examination or in such answer, or if any person shall procure any other person so to do, he or she so swearing falsely or procuring any other person so to do, shall be deemed to have been guilty of, and shall be liable to be prosecuted for wilful and corrupt perjury, or subornation of wilful and corrupt perjury, as the case may be; and shall suffer the pains, penalties, and punishments of the law in such case respectively made and provided."

Perjury in respect of Pilotage, &c. of Ships.

The statute 48 Geo. III. c. 104. entitled, "An act for the better regulation of pilots, and of the pilotage of ships and vessels navigating the British seas," enacts (by s. 70.) "that every person, who, in any examination upon oath under the provisions of this act, shall wilfully give false testimony or a false account of the matter sworn to by him, shall be liable to be prosecuted for the same by indictment; and, if duly convicted of false swearing in the premises, shall be subject and liable to such punishments, disqualifications, and disabilities, as any person would be subject or liable to for wilful and corrupt perjury, in any other case, by the laws and statutes of this realm."

Perjury under the Slave trade act.

The statute 46 Geo. III. c. 52. which was passed to prevent the importation of slaves, into any islands, colonies, &c. enacts, (by s. 16.) "that if any person taking any oath by this act authorised or required to be taken, shall thereby commit wilful perjury, or if any person shall unlawfully pro-

cure or suborn any person to take any oath by this act authorised or required to be taken, whereby such person \*shall [\*1772] commit wilful perjury, every such person shall incur and suffer the like pains and penalties as are by law inflicted upon persons committing wilful and corrupt perjury or subornation of perjury respectively."

By the 50 Geo. III. c. 65. an act for uniting the offices of surveyor-general of the land revenues of the crown, and surveyor-general of his majesty's woods, &c. it is enacted, (s. 11.) that any officer or other person, who shall in any verification, or examination upon oath mentioned in that act, be guilty of wilful and corrupt perjury, shall be liable to be punished in such manner as by the different laws and statutes then in force for the punishment of wilful and corrupt perjury.

Perjury in respect of the land revenues, &c. of the crown.

The general Inclosure act, 41 Geo. III. c. 109. s. 43. enacts, "that if any person or persons shall, in any examination, affidavit, deposition, or affirmation, to be had or taken in pursuance of this act, before such justice or justices, or such commissioner or commissioners, knowingly and wilfully swear and affirm any matter or thing which shall be false or untrue, every such person so offending shall, on conviction thereof, be deemed guilty of perjury, and shall suffer the like pains and penalties as persons guilty of wilful and corrupt perjury are now subject and liable to."

Perjury by the general Inclosure act.

The registry act for the West Riding of Yorkshire, 2 and 3 Ann. c. 4. enacts (by s. 19.) "that if any person or persons shall at any time forswear himself before the said register or his deputy, or before any Judge or master in Chancery, in any of the cases aforesaid, and be thereof lawfully convicted, such person or persons shall incur and be liable to the same penalties, as if the same oath had been made in any of the courts of records at Westminster." A similar provision is contained also in the 5 and 6 Ann. c. 18. which regulates the inrollment of bargains and sales of lands, &c. in the same Riding; in the *Middlesex* registry act, 7 \*Ann. c. 20. s. 15.; [\*1773] and also in the 8 Geo. II. c. 6. s. 33. which relates to the registry of deeds, &c. in the North Riding of the county of York.

Perjury under the Registry acts for Yorkshire and Middlesex.

The *Bribery act* 2 Geo. II. c. 24. gives the form of an oath or affirmation (in the case of a Quaker), to be taken by electors, and the form of an oath to be taken by the returning officer; and then enacts (by s. 5.) "that if any returning officer, elector or person taking the oath or affirmation hereinbefore mentioned, shall be guilty of wilful and corrupt perjury, or of false affirming, and be thereof convicted by due course of law, he shall incur and suffer the pains and penalties, which by law are enacted or inflicted in cases of wilful and corrupt perjury." And the 18 Geo. II. c. 18. s. 1. after giving the form of an oath or affirmation to be taken by free-

Perjury by electors, &c. 2 Geo. II. c. 24.

18 Geo. II. c. 18.

holders at county elections, enacts, that “in case any freeholder or other person taking the said oath or affirmation hereby appointed, shall thereby commit wilful perjury, and be thereof convicted, and if any person do unlawfully and corruptly procure or suborn any freeholder, or other person, to take the said oath or affirmation, in order to be polled, whereby he shall commit such wilful perjury, and shall be thereof convicted, he and they for every such offence,” shall incur such pains and penalties as “are in and by two acts of parliament,” (the one the 5 Eliz. c. 9., the other the 2 Geo. II. c. 25.) “contrary to the said acts.” The word *inflicted*, or some word of like signification, appears to have been omitted in the conclusion of this section.

Perjury before committees of the House of Commons, on the trial of [\*1774] controverted elections.

The statute 10 Geo. III. c. 16. (a) entitled “an act to regulate the trials of controverted elections or returns of members to serve in Parliament,” provides for the appointment of select committees, and directs certain oaths to be taken; and then by s. 29. enacts “that the oaths by this act directed to be taken in the house, shall be administered by \*the said clerk or clerk assistant, in the same manner as the oaths of allegiance and supremacy are administered in the House of Commons; and that the oaths by this act directed to be taken before the said select committee, shall be administered by the clerk attending the said select committee; and that all persons who shall be guilty of wilful and corrupt perjury in any evidence which they shall give before the house, or the said select committee, in consequence of the oath which they shall have taken by the direction of this act, shall, on conviction thereof, incur and suffer the like pains and penalties, to which any other person convicted of wilful and corrupt perjury, is liable by the laws and statutes of this realm.”

Perjury by bankrupts, and other persons before the commissioners of bankrupt.

The statutes 1 Jac. I. c. 15. and 5 Geo. II. c. 30. made provision for punishing perjury committed by bankrupts in the course of their examinations. The latter statute (by s. 29.) enacts, “that if any person shall before the acting commissioners in any commission of bankrupt, or by affidavit or affirmation exhibited to them, swear or depose, or, being of the people called Quakers, affirm, that any sum of money is due to him or her from any bankrupt or bankrupts, which sum of money is not really due or owing, or shall swear or affirm, that more is due than is really due or owing, knowing the same to be not due or owing, and that such oath or affirmation is false and untrue, and being thereof convicted by indictment or information, such person shall suffer the pains and penalties inflicted by the several statutes made and now in force against wilful perjury, and shall moreover be liable to pay double the sum so sworn or affirmed to be due or owing as aforesaid, to be recovered and levied as other penalties

a This act was made perpetual by 14 Geo. III. c. 15



and forfeitures are upon penal statutes after conviction to be levied and recovered; and such double sum shall be equally divided among all the creditors seeking relief under the said commission."

The *Insolvent debtors* acts usually contain clauses relating to perjury; as the 44 Geo. III. c. 108. s. 29, 31. 46 Geo. III. c. 108. s. 29, 31. 51 Geo. III. c. 125. s. 26, 28. 53 Geo. III. c. 102. s. 28. 53 Geo. III. c. 138. s. 28. (*Irish*). 54 Geo. III. c. 23. s. 15. 54 Geo. III. c. 28. s. 27, 56.; which for the most part enact, that persons taking the false oaths therein mentioned, shall "suffer such punishment as by the law may be inflicted on persons convicted of wilful and corrupt perjury."

Perjury by insolvent debtors.

[\*1775]

There are also some statutes of limited and local operation which contain enactments respecting perjury, a few of which may be briefly noticed. The 11 Geo. I. c. 18. s. 3. relates to false oaths taken at elections for the city of *London*; the 44 Geo. III. c. 60. s. 4. to perjury at elections for *Aylesbury*; the 47 Geo. III. sess. 2. c. 109. s. 123. (local act) to perjury under the *Dublin* improvement act; the 47 Geo. III. sess. 2. c. 68. s. 149., 56 Geo. III. c. 21. s. 49., and 56 Geo. III. c. 78. s. 50. (local acts) relate to false oaths taken in the course of the vending, admeasurement, &c. of *coals* in *London*, and certain places in the neighbouring counties; and the 55 Geo. III. c. 99. s. 16. (local act) to false oaths taken in respect of *bread* sold in *London*, or within the bills of mortality. These statutes, and others of a similar kind, either provide that the offenders shall be punishable under the 5 Eliz. c. 9. and the 2 Geo. II. c. 25. s. 2. or (which is more generally the case) enact, that they "shall be subject and liable to the pains and penalties, which persons convicted of wilful and corrupt perjury are subject and liable to."

Perjury by statutes of limited and local operation.

With respect to the first of the statutes above set forth, namely, the 5 Eliz. c. 9. as it is but little resorted to at the present time, on account of prosecutions upon it being more difficult than at the common law; and as it did not alter the nature of the offence, but merely enlarged the punishment, (o) a brief statement of some of the principal points decided upon its construction will probably be deemed sufficient.

Construction of the statute 3 Eliz. c. 9.

\*In many instances an indictment will lie at common law, when it will not lie upon this statute. Thus where a witness for the king swears falsely, he cannot be indicted on the statute. (p)

[\*1776]

It has been adjudged, that a man cannot be guilty of perjury within this statute, in any case wherein he may not possibly be guilty of subornation of perjury within it; on the ground that it is reasonable to give the whole statute the same construction; and that it cannot well be intended, that the



makers of it meant to extend its purview farther as to perjury, which they appear to have considered as the less crime, than to subornation of perjury, which they seem to have esteemed the greater: and, therefore, since the clause concerning subornation of perjury, mentioning only matters depending by writ, bill, plaint or information, concerning hereditaments, goods, debts, or damages, &c. does not extend to perjury on an indictment or criminal information; the clause concerning perjury, though penned in more general words, has been adjudged to come under the like restriction. (*q*) And it has also been resolved, that as the clause concerning subornation of perjury relates only to perjury by *witnesses*, that concerning perjury extends to no other perjury than that of a *witness*; and, therefore, not to perjury in an answer in chancery; or in swearing the peace against a man; or in a presentment by a homager in a court baron; or in a wager of law; or in swearing before commissioners of inquiry of the king's title to lands. (*r*) And, by the opinions of some, a false affidavit against a man, in a court of justice, is not within the statute. (*s*) But it is observed, that if such affidavit be by a third person, and relate to a cause depending in suit, before the court, and either of the parties in variance be grieved, hindered or molested, in \*respect of such cause, by reason of the perjury, it may be strongly argued, that it is within the purview of the statute. (*t*) It seems to be the better opinion, that a false oath before the sheriff on a writ of inquiry of damages, is within the statute. (*u*)

[\*1777]

It has been collected from the clause giving an action to the party grieved, that no false oath is within the statute, which does not give some person a just cause of complaint; and, therefore, that if the thing sworn be true, though it be not known by him that swears it to be so, the oath is not within the statute, because it gives no good ground of complaint to the other party, who would take advantage of another's want of sufficient evidence to make out the justice of the cause. (*y*) And upon the same ground no false oath can be within the statute, unless the party against whom it was sworn suffered some disadvantage by it: therefore, in every prosecution on the statute, it is necessary to set forth the record wherein the perjury is supposed to have been committed, and to prove at the trial that there is such a record, either by actually producing it, or by an attested copy; and it is necessary not only to set forth in the pleadings the point wherein the false oath was taken, but to shew also how it conduced to the proof or disproof of the matter in question. (*z*) And if an action on the

*q* 5 Bac. Ab. *Perjury*, (B). 1 Hawk. P. C. c. 69. s. 19.

*r* 1 Hawk. P. C. c. 69. s. 20. 5 Bac. Ab. *Perjury*, (B).

*s* 2 Roll. Ab. 77. 1 Roll. 79. 3 Keb. 345.

*t* 1 Hawk. P. C. c. 69. s. 21.

*u* 5 Bac. Ab. *Perjury*, (B). 1 Hawk. P. C. c. 69. s. 21.

*y* 1 Hawk. P. C. c. 69. s. 22. 5 Bac. Ab. *Perjury*, (B). We have seen that this is otherwise at common law. *Ante*, 1754.

*z* 5 Bac. Ab. *Perjury*, (B). 1 Hawk. P. C. c. 69. s. 23.

statute be brought by more than one, it is necessary to shew how the perjury was prejudicial to each of the plaintiffs. (a) But it seems that a perjury, which tends only to aggravate or extenuate the damages, is as much within the statute as a perjury that goes directly to the point in issue; and that perjury committed in a cause wherein an erroneous judgment is given, \*is a good ground of a prosecution upon the statute till the judgment be reversed. (b) [\*1778]

It has been holden that every indictment or action upon this statute must exactly pursue the words of it; and, therefore, if it allege that the defendant deposed such a matter *falsò et deceptivè*, or *falsò et corruptè*, or *falsò et voluntariè*, without saying *voluntariè et corruptè*, it is not good, though it conclude that *sic voluntarium et corruptum commisit perjurium contra formam statuti, &c.* Also it is said to be necessary expressly to shew that the defendant was sworn; and that it is not sufficient to say that *tacto per se sacro evangelio deposuit*. But there is no need to shew whether the party took the false oath through the subornation of another, or of his own act, though the words of the statute are, “*If persons by subornation, &c. or their own act, &c. shall commit wilful perjury;*” for there being no medium between the branches of this distinction, they seem to be put in *ex abundanti*, and to express no more than the law would have implied, and, therefore, operate nothing. (c)

Indictment  
on the 5  
Eliz. c. 9.

It seems that if perjury be committed that is within this statute, but the indictment concludes not *contra formam statuti*, yet it is a good indictment at common law, but not to bring the offender within the corporal punishment of the statute. (d)

For the purpose of facilitating prosecutions for perjury, and of preventing great offenders from escaping punishment by reason of the expense attending prosecutions, the statute 23 Geo. II. c. 11. s. 3. enacts, “that it shall and may be lawful to and for any of his majesty’s justices of assize, or *nisi prius*, or general gaol delivery, or of any of \*the great sessions of the principality of Wales, or of the counties palatine; and they are hereby authorized (sitting the court, or within twenty-four hours after,) to direct any person examined as a witness upon any trial before him or them, to be prosecuted for the said offence of perjury, in case there shall appear to him or them a reasonable cause for such prosecution, and that it shall appear to him or them proper so to do; and to assign the party injured, or other person undertaking such prosecution, counsel, who shall and are hereby required to do their duty without any fee, gratuity or reward for the same: Facilities given to prosecutions for perjury. 23 Geo. II. c. 11. s. 3. The judges [\*1779] of assize, &c. may direct any witness to be prosecuted for perjury, and assign counsel, &c.

a *Id. Ibid.*

notwithstanding such reversal?

b 1 Hawk. P. C. c. 69. s. 23. 5 Bac. Ab. Perjury (B). In 1 Hawk. P. C. c. 69. s. 4. there is a *quære* whether perjury in a court, whose proceedings are afterwards reversed by error, may not still be punished as perjury.

c 1 Hawk. P. C. c. 69. s. 17, 18. 5 Bac. Ab. Perjury (B). and the authorities there cited.

d 2 Hale, 191, 192.

and every such prosecution, so directed as aforesaid, shall be carried on without payment of any tax or duty, and without payment of any fees in court, or to any officer of the court who might otherwise claim or demand the same. And the clerk of assize, or his associate or prothonotary, or other proper officer of the court (who shall be attending when such prosecution is directed) shall, and is hereby required, without any fee or reward, to give the party injured, or other person undertaking such prosecution, a certificate of the same being directed, together with the names of the counsel assigned him by the court; which certificate shall in all cases be deemed sufficient proof of such prosecution having been directed as aforesaid, provided that no such direction or certificate shall be given in evidence upon any trial to be had against any person upon a prosecution so directed as aforesaid."

Provision  
for the  
more easy  
framing of  
indict-  
ments.

[\*1780]

The same statute also makes provision for the more easy framing of indictments for perjury and subornation of perjury. The first section, reciting that by reason of the difficulties attending prosecutions for perjury and subornation of perjury, those heinous crimes had frequently gone unpunished, enacts, "that in every information or indictment to be prosecuted against any person for wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court, or before whom the oath was taken (averring such \*court, or person or persons to have a competent authority to administer the same) together with the proper averment or averments to falsify the matter or matters, wherein the perjury or perjuries is or are assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or in equity, other than as aforesaid; and without setting forth the commission or authority of the court, or person or persons before whom the perjury was committed." And the second section enacts, "that in every information or indictment for subornation of perjury, or for corrupt bargaining or contracting with others to commit wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, and without setting forth the commission or authority of the court, or person or persons before whom the perjury was committed, or was agreed or promised to be committed."

The provi-  
sions of this  
statute  
should be  
attended

It was lamented by a very great Judge that the party, prosecuting for perjury, did not more frequently avail himself of this excellent law, made for the purpose of obviating difficulties in drawing the indictments. (c) In the case in

<sup>c</sup> By Lord Kenyon, C. J., in *Rex v. Dowlin*. which the court of K. B. referred an indictment for perjury, which had been removed  
<sup>5</sup> T. R. 317. And a case is mentioned in

which this remark was made, the commission at the Admiralty session had been unnecessarily set forth in the indictment; and it was admitted that where a prosecutor undertakes to set out in the indictment more of the proceedings than he need under this statute, he must set them forth correctly; but it was holden that the commission at the \*Admiralty session being set forth as directed to A., B., and C., and others not named, of which number A., B., and C., amongst others, *should always be one*, the court must take it to mean that if either of the persons, named of the quorum, were present, it would be sufficient. (f)

to in drawing indictments.

[\*1781]

It has been holden, on motion in arrest of judgment, that several persons cannot be joined in one indictment for perjury, the crime being in its nature several. (g) But this does not apply to subornation of perjury. (h)

Several persons not to be joined in an indictment for perjury. Venue.

With respect to the *venue* in an indictment for perjury it may be briefly observed that the parish or place, unless used as giving some specific local description, will not be material; and that it will be sufficient to shew the offence committed any where within the county. But it seems to be necessary that a place should be stated in the indictment to which a venue may be properly awarded: and an indictment was holden to be bad for laying the offence to have been committed "at the Guildhall of the city of London," without stating any parish or ward. (i) In a case where perjury had been committed in the booth-hall within the limits of the city of Gloucester, which is a county of itself, on the trial of a cause before a jury of the county at large, it was holden that the indictment might be found and tried by juries of the county at large. (k) A sufficient venue was holden to be laid on the act of taking the false oath in a case where perjury was assigned on an affidavit of an attorney of the court made in answer to a summary application against him, and where it was objected that it was not stated where the court was holden when the original application was made, or when the rule was made, calling upon the defendant to answer the charge. (l)

\*The indictment must also contain an allegation of *time*; which is sometimes material and necessary to be laid with precision, and sometimes not. (m) Where it is not material, it need not be positively averred; and, if under a videlicet, may be rejected. (n) In a case where an indictment for per-

[\*1782] Allegation of time in the indictment.

from Hicks's Hall, to the master, to see what part of the record was unnecessary; and made an order that the clerk of the peace should pay the expence incurred by such unnecessary part. The indictment was drawn to an exorbitant length, by stating all the continuances on the former prosecution, &c. 1 Leach 201.

f Rex v. Dowlin, 5 T. R. 311.

g Rex v. Philips and another, 2 Str. 921.

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h Reg. r. Rhodes and another, 2 Ld. Raym. 886.

i Harris's case, 2 Leach 800.

k Rex v. Gough, Dougl. 760.

l Rex v. Crossley, 7 T. R. 315, ante, 1754, 1755.

m Rex v. Aylett, 1 T. R. 69.

n Rex v. Aylett, 1 T. R. 70, 71.

jury, charged to have been committed in the defendant's answer to a bill of discovery filed in the Court of Exchequer, alleged that the bill was filed on a day specified, it was holden that the day was not material, as it was not alleged as part of the record; and, therefore, that it was no variance though the bill, when produced, appeared to be entitled generally of a preceding term. (*o*) But in the same case where an assignment of perjury alleged that the defendant, at the time of effecting a policy of insurance purporting to have been underwritten by A., B., C., and others, on a day specified, well knew, &c. and it appeared on producing the policy that A. underwrote it on a different day, the defect was holden to be fatal, although it appeared that B., C., &c. did underwrite the policy on that day. (*p*)

Necessary  
statements  
in the in-  
dictment.

It is proper to make such a statement by way of inducement as will be sufficient to explain the assignment of perjury, and make it intelligible and consistent. And the statements in the indictment must, in general, be made with great accuracy. An indictment for perjury stating a bill of Middlesex as "issuing out of the office of the chief clerk assigned to enrol pleas in the court, &c." has been holden to be bad. (*q*) And a misrecital of the judgment roll of the cause, at the trial of which the perjury is alleged to have been committed, is also fatal. (*r*) And where an indictment for perjury, committed in a written deposition before

[\*1783] \*a magistrate, in which deposition a word necessary to the sense had been omitted, set out the substance and effect of the deposition, and supplied a word which the sense required, as though it were actually in the deposition, the variance was holden to be fatal. (*s*) And where a count in an indictment undertakes to set out continuously the substance and effect of what the defendant swore upon his examination, it must be proved that in substance and effect he swore the whole of what is set out, though several distinct assignments of perjury are made thereon. (*t*)

In an indictment for perjury committed before a select

*o* Rex v. Hucks, *cor.* Lord Ellenborough, C. J., 1 Stark. R. 521. And see Rastal v. Stratton, 1 H. B. 49. Woodford v. Ashley, 2 Campb. 193. and 1 Stark. Crim. Plead. 243.

*p* Rex v. Hucks, 1 Stark. R. 521.

*q* Rex v. Scoole, *cor.* Kenyon, C. J., Peake, N. P. R. 112.

*r* Rex v. Eden, *cor.* Kenyon, C. J. 1 Esp. R. 97.

*s* Rex v. Taylor, *cor.* Ellenborough, C. J., 1 Campb. 404. The deposition should have been set out literally, and the meaning explained by an *innuendo*. The indictment stated that the defendant went before a justice of the peace, and swore in substance to the effect following, that is to say, &c., and part of the deposition, so set forth, was that

a person, therein named, assaulted the deponent with an umbrella, and, at the same time, threatened to shoot her with a pistol: but when the deposition was produced, it appeared that after stating the assault with the umbrella it proceeded thus, "and at the same time threatened to shoot, &c." omitting the word *time*.

*t* Rex v. Leefe, *cor.* Ellenborough, C. J., 2 Campb. 134, *post.* note (*u*). It appears, however, that in Reg. v. Rhodes and another, 2 Ld. Raym. 886, it was holden, upon an indictment containing only one count, that although all the assignments of perjury but one were bad, judgment should not be arrested. And see Compagnon and wife v. Martin, 2 Black. R. 790.

committee of the House of Commons, it was averred that the election was held by virtue of a certain precept of the high sheriff, by him duly issued to the bailiff of the borough of New Malton; and it was holden that this was not matter of description, and that the production of a precept, which in fact issued to the bailiff of the borough of New Malton, though directed to the bailiff of the borough of Malton, was sufficient: but the indictment also stated that A. and B. were returned to serve as burgesses for the said borough of New Malton; and this was considered as a description of the indenture of return, in which the borough was described \*as the borough of Malton, and the variance was holden to be fatal. (u) But where an indictment alleged that *Francis Cavendish Aberdeen*, and others, exhibited their bill in the exchequer &c., and, on the production of the bill, the complainants on the face of it purported to be *J. C. Aberdeen*, and others, it was holden that this was not a variance, and that it was competent to the prosecutor to prove, by other means than by the bill itself, the allegation that *Francis Cavendish Aberdeen* did, in fact, exhibit his bill. (x) And it was further holden not to be a variance, although after the allegation in question, and after setting out such parts of the bill as were necessary, these words were added, "as appears by the said bill, &c. filed of record;" on the ground that these words referred to the last antecedent, and could not be considered as incorporated with the prefatory allegation that *Francis Cavendish Aberdeen* exhibited his bill. (y) And in an indictment for perjury committed in an answer to a bill in chancery, where the bill was stated to have been filed by A. against B. (the defendant in the indictment,) and another, though in fact it was filed against B., C., and D., the variance was holden not to be fatal; the perjury being assigned on a part of the answer which was material between A. and B. (z) And it has been holden, that though there be two counts in the original proceeding, an averment that an issue came on to be tried is not a variance. (a) And a variance between the affidavit actually sworn, and in which the perjury was charged to have been committed, and the affidavit stated in the indictment, by leaving out the letter s in the word *understood*, was holden to be immaterial. (b) In a subsequent case. the defendant \*was tried on an indictment for perjury, committed in giving evidence as the prosecutor of an indictment against A. for [\*1784]

u *Rex v. Leese*, 2 Campb. 141.

x *Rex v. Roper*, cor. Ellenborough, C. J. 1 Stark. R. 518.

y *Id. Ibid.*

z *Rex v. Benson*, cor. Ellenborough, C. J. 2 Campb. 509.

a *Peake's N. P. C.* 37.

b *Beech's case*, 1 Leach 133. The inspection of a record is within the peculiar province of the court; and therefore, if a doubt arise as to any word upon a record, the court and not the jury must resolve that doubt. By *Id. Ellenborough, C. J. in Rex v. Huske*, 1 Stark. R. 521



an assault; and it appeared that the indictment for the assault charged, that the prosecutor had received an injury, "*whereby his life was greatly despaired of;*" but that in the indictment for *perjury*, the indictment for *the assault*, being introduced in these words "*which indictment was presented in manner and form following, that is to say,*" and then set forth at length, did not recite the above-mentioned passage correctly, but omitted the word "*despaired;*" upon which the counsel for the defendant admitted that it was not necessary to have recited the indictment for the assault; but he contended that the prosecutor, by the words "*in manner and form following, that is to say,*" had undertaken to recite it; and that having so done, he was bound to set it forth *verbatim*. But the learned Judge over-ruled the objection; and said, that the word "*tenor*" had so strict and technical a meaning as to make a literal recital necessary; but that by the words "*in manner and form following, that is to say*" nothing more was made requisite than a substantial recital: and that the variance, therefore, in the present case, was only matter of *form*, and did not vitiate the indictment. (c)

In a case where a complaint having been made *ore tenus* by a solicitor, before the Chancellor in the Court of Chancery, of an arrest in returning home after the hearing of a cause, the indictment stated that, "*at and upon the hearing of the said complaint*" the defendant deposed, &c.; and this was holden to be a sufficient averment that the complaint was *heard*. (d) And it has been holden, that an indictment for perjury, assigned on an affidavit sworn before the court, need not state that the affidavit was filed of record, or exhibited to the court, or in any manner used by the party. (e)

[\*1786]

The indictment must state that the defendant was duly sworn, &c.

\*It is sufficient to state in the indictment that the defendant was *duly* sworn. (f) In a case where it was averred that he was *sworn on the gospels*, and he appeared to have been sworn according to the custom of his own country, without kissing the book, it was considered as a fatal variance; though it was holden that the averment was proved by its appearing that he was *previously* sworn in the ordinary mode. (g) An indictment for perjury in a cause tried at the assizes was holden good, although it alleged the oath to have been taken before one only of the Judges in the commission, whereas the names of both Judges were as usual inserted in the *nisi prius* record. (h) An indictment at com-

c May's case, cor. Buller, J., 1799. The learned Judge cited Beech's case, *ante*, note (b).

d Rex v. Aylett, 1 T. R. 70.

e Rex v. Crossley, 7 T. R. 315. Nor is it necessary to prove such facts. *Id. Ibid.*

f Rex v. McCarthur, cor. Kenyon, C. J. Peake's N. P. C. 155.

g *Id. Ibid.*

h Rex v. Alford, 1 Leach 150. In Reg

v. Deman, 2 Ld. Raym. 1221. an exception was taken to an indictment; that it stated the trial at which the oath was taken to have been before the Lord Chief Baron and the associate, but stated the oath to have been before the Chief Baron, without the associate; and also, that the assignment of perjury differed from the oath, being before the Chief Baron and associate. But the objec-

mon law, which charged that the defendant “falsely, maliciously, wickedly, and corruptly swore, &c.” was holden sufficiently to imply that the offence was committed *wilfully*; (i) but it was considered at the same time that, in an indictment on the statute 5 Eliz. c. 9., the offence must be laid expressly to have been wilfully committed. (k)

It is necessary that it should appear on the face of the indictment that the oath taken was *material* to the question depending. (l) But it is not necessary to set forth in the indictment so much of the proceedings of the former trial as will shew the materiality of the question on which the perjury is assigned; and it will be sufficient to allege generally that the particular question became a material question. (m) \*Thus, statements that, at a court of admiralty session, J. K. was “in due form of law tried upon a certain indictment then and there depending against him” for murder, and that “at and upon the said trial it then and there became, and was made a material question,” whether, &c. were holden to be sufficient averments that the perjury was committed on the trial of J. K. for the murder, and that the question on which the perjury was assigned was material on that trial. (n) It is suggested that if the materiality of the question evidently appears upon the record, as where the falsehood affects the very circumstance of innocence or guilt, or where the perjury is assigned on documents from the recital of which it is evident that the perjury was important, the express allegation may with safety be omitted. (o)

It is also necessary that the indictment should expressly contradict the matter falsely sworn to by the defendant. And the general averment that the defendant falsely swore, &c. upon the whole matter, will not be sufficient: the indictment must proceed by particular averments, (or, as they are technically termed, by *assignments of perjury*;) to negative that which is false. It may be necessary to set forth the whole matter to which the defendant swore, in order to make the rest intelligible, though some of the circumstances had a real existence: but the word “falsely” does not import that the whole is false; and when the proper averments come to be made, it is not necessary to negative the whole, but only such parts as the prosecutor can falsify, admitting the truth of the rest. (p) It is suggested that in negating the defendant’s oath where he has sworn only to his *belief*, (q) it will be proper to aver that “*he well knew*” the contrary of what he swore. (r) It

It must appear on the face of the indictment that the oath was *material*.

[\*1787]

The indictment must expressly contradict the matter sworn to by the defendant.

tions were overruled; and the court held that the associate need not be mentioned in every part of the indictment where the Chief Baron was mentioned.

i As to the offence being *wilful*, see *ante*, 1753.

k Cox’s case, 1 Leach 71.

Rex v. Aylett, 1 T. R. 69.

m Rex v. Dowlin, 5 T. R. 318.

n *Id. Ibid.*

o 2 Chit. Crim. L. 309.; citing Trem. P. C. 139, &c. and 7 T. R. 315.

p Rex v. Perrott, 2 M. and S. 385. 390, 391, 392. And see *ante* 1400, 1401.

q *Ante*, 1753.

r 2 Chit. Crim. L. 312

seems that an assignment of perjury may, in some instances, be more full than \*the statement of the defendant, which it is intended to contradict. Thus, where the fact in the affidavit in which the defendant was charged to have perjured himself, was, that he never did, at any time during his transactions with the commissioners of the victualling-office, charge more than the usual sum of sixpence per quarter beyond the price he actually paid for any malt or grain purchased by him for the said commissioners as their corn-factor; and the assignment in the indictment, to falsify this, alleged that the defendant did charge more than sixpence per quarter for and in respect of such malt and grain so purchased; it was objected that the words *in respect of* might include lighterage, freight, and many collateral and incidental expences attending the corn and grain jointly with the charge for the corn or grain, and, that bearing such sense, the defendant was not guilty of perjury: but the objection was over-ruled. (s)

Of the *innuendo*.

If there be any doubt on the words of the oath, which can be made more clear and precise by a reference to some former matter, it may be supplied by an *innuendo*; the use of which is, by reference to preceding matter, to explain and fix its meaning more precisely: (t) but it is not allowed to add to, extend, or change the sense. (u) We have seen that, in a case of perjury committed in an affidavit, it was holden that a word which had been omitted by accident in the original document was improperly stated in the indictment, as though it had been in the original document, and that such word ought to have been inserted and explained by an *innuendo*. (x) In a case where an objection was taken to an indictment, that it added, by way of *innuendo* to the defendant's oath, "his house situate in the *Haymarket*, in *St. Martin in the Fields*:" without stating by any averment, recital, or introductory matter, that he had a house in the *Haymarket*; or, (even admitting him to have such a house,) that his oath was of and concerning the said house, so situated, the objection was over-ruled; on the ground that the *innuendo* was only a more particular description of the same house which had been previously mentioned. (y) And, in the same case, the oath of the defendant being that he was arrested upon the steps of his own door, an *innuendo* that it was the outer door was holden good. (z) Where an *innuendo* is introduced contrary to the rules which have been mentioned, and any use is made of it in the indictment, it cannot be rejected as surplusage, and it will be bad after verdict. (a) But if the *innuendo*, and the matter introduced by it, are alto-

s Rex v. Atkinson, Dom. Proc. 1737. 5 Bac. Ab. *Perjury*, (C.)

t Rex v. Aylett, 1 T. R. 70. Rex v. Taylor, 1 Campb. 404.

u Rex v. Griep, 1 Ld. Raym. 266. 2 Salk. 513. And see as to the use of an *innuendo*, 1 Saund. 243, note c 13. 1 Chit. on

Plead. 382, 383. 1 Stark. Crim. Plead. 108, *et sequ.*

x Rex v. Taylor, 1 Campb. 404. *Ante*, 1783.

y Rex v. Aylett, 1 T. R. 70.

z *Id. ibid.*

a Rex v. Griep, 1 Ld. Raym. 266.

gether impertinent and immaterial, and can have no effect in enlarging the sense, it seems that they may be rejected as superfluous. (b)

In general the court will oblige the defendant to plead or demur to a defective indictment for perjury. (c) And they are also very cautious in granting a certiorari to remove it. (d) And it appears that Lord Thurlow refused permission to amend an answer where an indictment for perjury had only been threatened, even where the party, having no interest, could not be supposed to take the false oath intentionally. (e) In a late case, Abbott, Ld. C. J. said, that, inasmuch as the objection taken to an indictment for perjury appeared upon the record, he did not feel himself warranted in taking notice of it at nisi prius. (f)

The court will, in general, oblige the defendant to plead or demur to a defective indictment.

The right of the defendant to plead a plea of *autrefois acquit* came under the consideration of the Court of King's Bench in the following case. The defendant was indicted in *Middlesex*, for perjury committed in an affidavit; which indictment, after setting out so much of the affidavit as contained the false oath, concluded, with a *prout patet*, by the affidavit filed in the Court of King's Bench, at Westminster, &c. and on this he was acquitted; after which he was indicted again in *Middlesex*, for the same perjury, with this difference only, that the second indictment set out the jurat of the affidavit, in which it was stated to have been sworn in *London*; which was traversed by an averment that, in fact, the defendant was so sworn in *Middlesex*, and not in *London*: and the Court of King's Bench held, that he was entitled to plead *autrefois acquit*, as the *jurat* was not conclusive as to the *place* of swearing; and the same evidence as to the real place of swearing the affidavit might have been given under the first as under the second indictment; and, therefore, the defendant had been once before put in jeopardy for the same offence. (g)

Plea of *autrefois acquit*. [\*1790]

With respect to the trial of perjury it may be observed, that the courts of quarter sessions have no jurisdiction over the offence at common law, though they have jurisdiction over it under the statute 5 Eliz. c. 9. (h) The difficulties of proceeding upon that statute have been before adverted to; (i) so that the safer and most usual mode of proceeding is by indictment at the assizes, or in the King's Bench. And indictments for perjury at common law, preferred at the

Trial. Jurisdiction of quarter sessions.

b Roberts v. Camden, 9 East. 95. 2 Chit. Crim. L. 311.

c 2 Hawk. P. C. c. 25. s. 146.

d 2 Hawk. P. C. c. 27. s. 28.

e Brown's Chan. Cas. 419.

f Rex v. Souter, 2 Stark R. 423. The objection was, that the indictment was drawn in the compendious manner prescribed by the 23 Geo. II. c. 11.; and yet no count alleged

that the question upon the answers to which perjury was assigned was material.

g Rex v. Embden, 9 East. 437.

h 1 Hawk. P. C. c. 69. s. 14. note (5.) 2 Hawk. P. C. c. 8. s. 38. Rex v. Higgins, 2 East. R. 18. ante, 1498. 3 Burn. Just. tit. Perjury, &c. 1.

i Ante. 1775.

quarter sessions, appear to have been quashed for want of jurisdiction. (*k*)

Summary  
proceeding.  
[\*1791]

Where a person made an affidavit in the Court of Common \*Pleas, and afterwards, being summoned to appear in court, came there, and confessed it to be false, the court recorded his confession, and ordered that he should be taken into custody, and put in the pillory. (*l*) In answer to the objections of the defendant's counsel to this proceeding, it was argued that it was fully justified under the 5 Eliz. c. 9., and that even if the court could not punish the defendant by virtue of that statute, he might be punished at common law, on the ground that any court might punish such a criminal for an offence committed in *facie curiæ*. (*m*)

Evidence.  
One wit-  
ness not  
sufficient.

The evidence of one witness is not sufficient to convict the defendant on an indictment for perjury; as, in such case, there would be only one oath against another. (*n*) But it is said that it does not appear to have been laid down that *two witnesses* are necessary to disprove the fact sworn to by the defendant, and that it does not seem to be absolutely necessary that there should be two; though, in addition to the testimony of a single witness, some other independent evidence ought to be adduced. (*o*)

Party pre-  
judiced by  
the perjury  
a compe-  
tent wit-  
ness.

[\*1792]

Though the contrary doctrine appears at one time to have prevailed, (*p*) it is now well established that the party prejudiced by the perjury is a competent witness to prove the offence. (*q*) And, though at one time it was considered necessary to shew that such party had satisfied the judgment in the suit in which the perjury was committed before he could be admitted as a witness; (*r*) on the ground that he \*might possibly make use of a conviction for the purpose of obtaining relief in equity against the judgment; yet, as it is now an established rule that a court of equity will not grant relief on a conviction which proceeds on the evidence of the prosecutor, (*s*) it is observed that there can be no objection to his being admitted a witness. (*t*) And even if the indictment proceed upon the statute 5 Eliz. c. 9. (*u*) which gives the prosecutor half the forfeiture incurred, it is conceived that, as in action to recover his moiety he would be precluded from giving the conviction in evidence, there would be no objection to his competency. (*x*)

*k* 3 Burn. Just. tit. *Perjury*, &c. Rex v. Bainton, 2 Str. 1038. Rex v. Westiness, *id.* *ibid.* 1 Chit. Crim. L. 301.

*l* Rex v. Thorogood, 8 Mod. 179.

*m* *Id.* *Ibid.*; and Bushel's case, Vaugh. 152 was cited.

*n* Reg. v. Muscot, 10 Mod. 193. 4 Black. Com. 358. Peake on Evid. 10. Phil. on Evid. 112.

*o* Phil. on Evid. 113.

*p* Rex v. Whiting, 1 Salk. 283. 1 Id. Ravm. 596. Rex v. Nunez, 2 Str. 1043.

Rex v. Ellis, *id.* 1104. 2 Hawk. P. C. c. 46. s. 24. Bull. N. P. 289.

*q* Rex v. Broughton, 2 Str. 1230. Abraham, q. t. v. Bunn, 4 Burr. 2255. Rex v. Boston, 4 East. 581.

*r* Rex v. Eden, 1 Esp. 97. Rex v. Dalby, Peake N. P. C. 12.

*s* Bartlett v. Pickersgill, 4 Burr. 2255. Smith v. Prager, 7 T. R. 60. Rex v. Boston, 4 East. 577.

*t* Phil. on Evid. 92.

*u* *Ante*, 1763.

*x* Phil. on Evid. 92. 93.

It has been ruled to be no objection to the competency of a witness on an indictment for perjury, committed in an answer in chancery, that, in his answer to a cross-bill, he has sworn to the same fact which he is called to prove upon the indictment. (y) And if several persons are separately indicted for perjury in swearing to the same fact, either of them, before conviction, may be a witness on the trial of the other. (z)

It has been holden, that if a count in an indictment for perjury undertake to set out continuously the *substance and effect* of what the defendant swore when examined as a witness, it is necessary, in support of this count, to prove, that *in substance and effect* he swore the whole of that which is thus set out as his evidence, although the count contains several distinct assignments of perjury. It was urged in support of the prosecution that *reddendo singula singulis*, the defendant was charged with swearing separately in answer to all the questions that were mentioned. But Lord Ellenborough, C. J. said, "Suppose you had undertaken to set out the *tenor* of what the defendant swore, and it should \*appear by the evidence that he had not sworn a material part of that which was set out, would not this have been fatal? Having taken upon you to state the *substance and effect* of what he swore, you are not bound down to precise words;—but must you not prove that he swore in substance and effect the whole that you have stated? You aver that part of the defendant's evidence concerning the assurance given by Lord Headley to be material, and you have not proved that he swore to any such assurance. Did you ever know the rule of *reddendo singula singulis* applied to a misrecital? Is there any authority to shew, that under *secundum substantiam*, you are not bound to prove the *substance* of what you state, as under *secundum tenorem*, you are bound to prove the *tenor*? To hold otherwise, would be to introduce a most dangerous latitude into criminal proceedings. I am decidedly of opinion that you have failed in the proof of a substantial allegation. It is essential to the security of innocence, that words set out in the record should be either literally or substantially proved. A person giving his assurance generally, and giving his assurance for the performance of a particular stipulation, are allowed to be entirely different. If a man swears falsely to several material questions, these may be included in distinct counts." (a)

It appears to have been ruled that upon an indictment for perjury committed at the trial of a cause, the prosecutor must

Proof of the defendant having sworn in substance and effect.

[\*1793]

Proof of the whole of

y Rex v. Pepys, Peake N. P. C. 133.

z 2 Hale, P. C. 280.

a Rex v. Leefe, 2 Campb. 131, 132. The learned reporter says, "I find no decision or dictum in the books as to the evidence of the

words sworn which is necessary to support an indictment for perjury. For the general principles upon this subject, vide 2 Hawk. P. C. c. 46. s. 34, 35, 36. Compagnon v. Martin, 2 Bl. rep. 790.



the defend-  
ant's testi-  
mony.

[\*1794]

prove *the whole* of the defendant's testimony ; (b) unless the perjury be assigned upon a point which first arose upon the defendant's cross-examination, in which case proof of the whole cross-examination has been ruled to be sufficient.\* (c) And the ground upon which proof of the *whole* of the examination, or cross-examination, was ruled to be necessary in these cases appears to have been, that possibly the defendant might have corrected in some part of such examinations any mistake he had made in other parts. But, it is observed, that this doctrine of compelling the prosecutor to prove more than a *primâ facie* case, is an anomaly in the criminal law, that in general the party indicting is not bound to anticipate matters of defence, which it lies on the prisoner to bring forward ; and that it does not seem that, in this case, the party indicted would sustain hardship in being compelled to shew that he had corrected the part of his evidence assigned. (d)

Proof of  
authority  
to adminis-  
ter the  
oath.

It is sufficient to support the averment that the party administering the oath had competent authority for that purpose, by shewing in the first instance that he *acted* as a person having such authority. Thus, upon an indictment for perjury before a surrogate in the ecclesiastical court, it was ruled, that the fact of the person who administered the oath having acted as a surrogate, was sufficient *primâ facie* evidence of his having been duly appointed, and having authority to administer it. And, Lord Ellenborough, C. J. said, "I think the fact of Dr. Parson having acted as surrogate, is sufficient *primâ facie* evidence, that he was duly appointed and had competent authority to administer the oath. I cannot for this purpose make any distinction between the ecclesiastical courts and other jurisdictions. It is a general presumption of law, that a person acting in a public capacity is duly authorised so to do." (e) But it was holden in the same case, that upon its appearing that the surrogate was appointed contrary to the canon, (which requires that no judicial act shall be speeded by any ecclesiastical Judge, unless in the presence of the registrar or his deputy, or other persons by law allowed in that behalf,) his appointment \*was a nullity, and the averment that he had authority to administer the oath was negatived. (f)

[\*1795]

Proof  
against a  
bankrupt.

It seems, that on an indictment against a bankrupt, for perjury before the commissioners in passing his last examination, it is necessary to give strict evidence of the trading, petitioning creditor's debt, and act of bankruptcy. (g)

Proof of  
the defend-  
ant hav-

On an indictment for perjury, in an answer in chancery, proof of the defendant's signature, and of that of the master

b Rex v. Jones, cor. Kenyon, C. J. 1791. 418.  
Peake N. P. C. 37.

c Rex v. Dowlin, cor. Kenyon, C. J. 1793.  
Peake, N. P. C. 170.

d 2 Chit. Crim. L. 312, referring to 1 Sid.

e Rex v. Verelst, 3 Campb. 432.

f Id. Ibid.

g Rex v. Punshon, 3 Campb. 96. And see  
Rex v. Bullock, 1 Taunt. 71.

before whom the answer purports to be sworn, is evidence of the defendant's having sworn to the truth of the contents, without calling the person who wrote the jurat; or further proving the identity of the defendant as being the very same person who had signed the answer. (*h*) In a case upon the statute 31 Geo. II. c. 10. s. 24. (for taking a *false oath* to obtain administration to a seaman's effects, in order to receive his wages) it was holden necessary to prove directly and positively, that it was the prisoner who took the oath. And the court said that the evidence given was defective, as there was a possibility, from any thing that had been given in evidence to the contrary, that the prisoner might have gone through all the rest of the fraud, and have avoided the circumstance of taking the oath, especially as he probably knew that the taking the oath was a capital felony. And they further said, that if this had been an indictment for perjury at common law, it would have been incumbent on the prosecutor to have given precise and positive proof that the prisoner was the person who took the oath; and it was equally incumbent on him so to do, upon an indictment on the statute in question. (*i*)

ing taken the oath in an answer in chancery, or upon obtaining administration of a seaman's effects.

\*Upon an indictment for perjury, in falsely taking the freeholders' oath at an election of a knight of the shire, in the name of J. W.; it appearing by competent evidence that the freeholders' oath was administered to a person who polled on the second day of the election, by the name of J. W. who swore to his freehold, and place of abode; and that there was no such person; and that the defendant voted on the second day, and was no freeholder, and sometime afterwards, boasted that he had *done the trick*, and was not paid enough for the *job*, and was afraid that he should be pulled for his *bad vote*; and it not appearing that more than one false vote was given on the second day's poll, or that the defendant voted in his own name, or any other than the name of J. W.; it was holden, that there was sufficient evidence for the jury to presume that the defendant voted in the name of J. W. and consequently to find him guilty of the charge as alleged in the indictment. (*k*)

[\*1796] Proof of taking the freeholder's oath at an election.

In a case of a prosecution against T. Reilly for suborning one Macdaniel to commit perjury, it was contended, on the part of the crown, that the bare production of the record of *Macdaniel's* conviction was of itself sufficient evidence that he had, in fact, taken the false oath as alleged in the indictment. But it was insisted, for the prisoner, that the record was not of itself sufficient evidence of the fact; that the jury had a right to be satisfied that such conviction was right; that Reilly had a right to controvert the guilt of *Macdaniel*; and

Proof upon a prosecution for subornation of perjury.

A Rex v. Benson, 2 Campb. 508. Rex v. Morris, 2 Burr. 1189. 1 Leach 50. The reason why the Court of Chancery made a general order that all defendants should sign their

answers was with a view to the more easy proof of perjury in answers. 2 Burr. 1189.

1 Brady's case 1784, 1 Leach 327.

k Rex v. Paine alias Wright, 6 East. 323.

that the evidence given on Macdaniel's trial ought to be submitted to the consideration of the present jury; and the recorder obliged the counsel for the crown to go through the whole case, in the same manner as if the jury had been charged to try Macdaniel. (*l*)

Punish-  
[\*1797]  
ment of  
perjury  
and subor-  
nation of  
perjury.

[\*1798]

The punishment of perjury and subornation of perjury, at common law, has been various; being anciently death; \*afterwards banishment, or cutting out the tongue; then forfeiture of goods. (*m*) At the present time it is fine, imprisonment, and pillory, at the discretion of the court, (*n*) to which, as we have seen, the statute 2 Geo. II. c. 25. (*o*) superadds a power for the court to order the offender to be sent to the house of correction for a term not exceeding seven years, or to be transported for the same period; and makes it felony, without benefit of clergy, to return or escape within the time. If the prosecution proceeds upon the 5 Eliz. c. 9. that statute, as we have seen, (*p*) inflicts the penalty of perpetual infamy, and a fine of £40 on the suborner; and, in default of payment, imprisonment for six months, and to stand with both ears nailed to the pillory; and punishes perjury itself with six months' imprisonment, perpetual \*infamy, and a fine of £20, or to have both ears nailed to the pillory.

It has been holden that the punishments directed by the statute 18 Geo. II. c. 18. (*q*) to be inflicted upon perjury, in falsely taking the freeholder's oath at an election of a knight of the shire, are cumulative under the statute 5 Eliz. c. 9. s. 6. (*r*) and 2 Geo. II. c. 25. s. 2. (*s*) to which the first mentioned statute 18 Geo. II. c. 18. refers. (*t*)

*l* Reilly's case, 1 Leach, 454.

*m* 4 Black. Com. 133.

*n* 4 Black. Com. 133. *Rex v. Nueys and Galey.* 1 Black. R. 416. *Rex v. Lookup,* 3 Burr. 1901. In this last case the form of the sentence was, that the defendant "should be set in and upon the pillory at C. cross for an hour between the hours of twelve and two, and that he should afterwards be transported to some of his Majesty's colonies or plantations in America, for the space of seven years; and be now remanded to the custody of the marshal, to be by him kept in safe custody, in execution of the judgment aforesaid, and until he shall be transported as aforesaid."

The statute 56 Geo. III. c. 138. s. 1. after abolishing the punishment of the pillory except for the offences thereafter mentioned proceeds thus; "Provided that all laws now in force whereby any person is subject to punishment for the taking any false oath, or for committing any manner of wilful and corrupt perjury, or for the procuring or suborning any other person so to do, or for wilfully, falsely, and corruptly affirming or declaring, or procuring or suborning any other person so to affirm and declare, in any matter or thing, which if the same had been deposed in the usual form would have amounted to wilful and corrupt

perjury, shall continue and be in full force and effect; and that all persons guilty of any of the said several offences shall incur and suffer the same punishment, penalties and forfeitures as such persons were subject to by the laws and statutes of this realm, or any of them, before the passing of this act, and as if this act had not been made."

*o* *Ante*, 1763.

*p* *Ante*, 1761.

*q* *Ante*, 1773.

*r* *Ante*, 1761, 1762.

*s* *Ante*, 1763.

*t* *Rex v. Price, alias Wright*, 6 East. 327. Grose, J. passed sentence upon the defendant and two other persons who had been convicted of similar perjuries in the following form:—"That each of them for this offence should lose and forfeit 20*l.*, and be imprisoned in Newgate by the space of six months without bail or main-prize, and that his oath from thenceforth be not received in any court of record within England or Wales, or the marches of the same, until such time as this judgment should be reversed by attainder or otherwise; and that after the expiration of the said six months he be transported to such place beyond the seas as his majesty, with the advice of his privy council, should think fit to direct and appoint, for the term of six years."

A consequence of a conviction for perjury, though it forms no part of the judgment, is, that the offender is incapacitated from giving evidence in a court of justice. (*u*) But a pardon will restore his competency; except in the case of a conviction for perjury or subornation of perjury on the statute 5 Eliz. c. 9. (*w*) which provides that the offender shall never be admitted to give evidence in courts of justice until the judgment be reversed; and, therefore, the king's pardon will not in such case make him a competent witness. (*x*)

Conviction for perjury incapacitates the offender from giving evidence.

A very summary mode of proceeding is given, where persons convicted of perjury practise as attornies or solicitors \*in courts of law or equity. The 12 Geo. I. c. 29. s. 4. enacts, "that if any person who hath been or who shall be convicted of forgery, or of wilful and corrupt perjury, or subornation of perjury, or common barratry, shall act or practise as an attorney, or solicitor or agent, in any suit or action, brought or to be brought in any court of law or equity within that part of Great Britain called England, the judge or judges of the court, where such suit or action is or shall be brought, shall, upon complaint or information thereof, examine the matter in a summary way in open court; and if it shall appear to the satisfaction of such judge or judges, that the person complained of, or against whom such information shall be given, hath offended contrary to this act, such judge or judges shall cause such offender to be transported for seven years to some or one of his majesty's colonies or plantations in America, by such ways, means, and methods, and in such manner, and under such pains and penalties as felons in other cases are by law to be transported."

Summary proceeding where persons convicted of perjury practice as attornies or solicitors. [\*1799]

## \*CHAPTER THE SECOND.

[\*1800]

### Of Conspiracy. (1)

THE conspiring to obstruct, pervert, or defeat the course of public justice; (*a*) to injure the public health, as by selling

Descriptions of conspiracy.

*u* Gilb. Ev. 126. Bull. N. P. 291. 4 Black. Com. 138. 2 Hawk. P. C. c. 46. s. 101.

*w* *Ante*, 1761, 1762.

*x* Phil. on Ev. 30. and the authorities there cited.

*a* Rex v. Mawbey and others, 6 T. R. 619. *et sequ.* 4 Black. Com. 136. 1 Hawk. P. C. c. 72. s. 2.

(1) MASSACHUSETTS.—In the case of the Commonwealth v. Judd & al. 2 M. R. 329, the law relative to the offence of conspiracy, and the numerous cases in the English authorities upon that subject, were fully discussed. The defendants were indicted for conspiring together to manufacture certain ma-

unwholesome provisions ; (b) or to effect any public mischief, as by raising the price of the public funds by illegal means ; (c) are offences punishable by indictment. And it appears that an indictment lies, not only wherever a conspiracy is entered

*6* Reg. r. Macarty and Fordenborough, 2 Ld. Raym. 1179. 2 East. P. C. c. 18. s. 5. p. 823. 4 Black. Com. 162. And see the remarks upon the case of Macarty and Fordenborough in 6 East. 133. 141.  
*c* Rex r. De Berenger and others, 3 M. & S. 67.

materials mentioned in the indictment, (of which one was good indigo of foreign growth,) a base composition resembling genuine indigo of the best quality, and of foreign growth, with the fraudulent intention that the same should be sold at public auction as genuine indigo of the best quality and of foreign growth. The indictment further alleged, that the defendants did in fact manufacture this base composition and exposed it to sale, and did sell it at public auction for genuine indigo of the best quality and foreign growth. The defendants were found guilty of the whole indictment except the last allegation, viz. that this base composition was in fact sold at auction.

Several objections were made to the verdict, the last and most important of which was, that the first count charges a conspiracy to do an act not prohibited by law, with an unlawful intent to defraud, not any individual, by name, but whoever might be the purchasers, without giving any description of them, and no act done in pursuance of this conspiracy is either alleged in the first count, or found by the verdict. Parsons, C. J. in delivering the opinion of the court, says, "The question is, whether the conspiracy as alleged in the first count, no act being alleged as done in pursuance of it, is an indictable offence. After fully considering the several cases, the court are of opinion, that the gist of a conspiracy is the unlawful confederacy to do an unlawful act, or even a lawful act for unlawful purposes. That the offence is complete when the confederacy is made, and any act done in pursuance of it is no constituent part of the offence, but merely an aggravation of it. This rule of the common law is to prevent unlawful combinations. A solitary offender may be easily detected and punished. But combinations against law are always dangerous to the public peace, and to private security. The unlawful confederacy is therefore punished, to prevent the doing of any acts in execution of it. Of this principle the adjudged cases have left no doubt." The learned Chief Justice then quotes the cases of the King v. Edwards & al. 8 Mod. 320. The King v. the Journeymen Taylors of Cambridge, *ibid.* 11. And the King v. Robbison. 1 Leach, C. 6. 47.

It was admitted, that the conspiracy to do a lawful act with the unlawful intent of injuring *an individual*, was an indictable offence, although no act were done in pursuance of it ;—but it was insisted that the law was different when the intent was to injure *a number of people not described*. The court were satisfied that the law made no such distinction. It does not in the cases of knowingly having in possession forged bank notes, or counterfeit current coin, with the intent to pass them as genuine ; for it is not necessary to allege an act done in these cases, in pursuance of the intent. The intent is to cheat whoever can be cheated. In this case there was the same general intent to defraud all who could be defrauded. "We therefore think the offence to be greatly aggravated by the undistinguishing mischief that was designed." For this the case of the *Journeymen Taylors* is substantially in point. The object was to raise their wages, and the persons to be injured were any persons who might employ them. The cases cited by the Solicitor General in support of

into for a corrupt or illegal purpose, but also where the conspiracy is to effect a legal purpose by the use of unlawful means: and this, although such purposes be not effected. (*d*) And it is laid down in a book of great authority that all con-

*d* Rex v. The Journeymen Taylors of Cambridge, 8 Mod. 11. Reg. v. Best, 2 Ld. Raym. 1167. 6 Mod. 85. 1 East. P. C. c. 11. s. 11. p. 462. But an action will not lie for a con-

spiracy, unless it be put in execution, 9 Co. 57. W. Jones, 93. Savile v. Roberts, 1 Ld. Raym. 378.

the doctrine were, Poulterer's case, 9 Rep. 56, 3d point. Rex v. Edwards & al. 8 Mod. 321. and 11 Mod. 55. 3 Burr. 1320. 1 Lev. 125. 1 Sid. 174, s. 6. 1 Kemble, 203. 1 Ventr. 304. 1 Str. 193. 1 Salk. 174. Rex v. Parsons & al. 1 W. Blackstone, 392. Rex v. Elizabeth Robison. 1 Leach, 44. 2 East. P. C. 816. 2 Burr. 1125, Wheatly's case. Young's case. 3 Term. Rep. 104. 6 Mod. 42. 2 East. P. C. 823. The cases cited by Otis for defendants, were, Macarty & Fordenburgh. 2 Lord Raymond, 1179. Hawk. B. 2. C. 72. s. 2.

In the case of the Commonwealth v. Tibbetts & al. the same doctrine, as laid down in Commonwealth v. Judd & al. was recognised and adhered to. The particular point decided in this case was, that in an indictment for a conspiracy to accuse one of a crime, it is not necessary to allege that the defendants procured or intended to procure an indictment or other legal process. And that any informality in the indictment, in alleging matter merely in aggravation of the offence, will not vitiate it. And in the Commonwealth v. Warren & al. 6 M. R. 74, the same doctrine is again recognised. "The gist of the offence, is the conspiracy to cheat the prosecutor." Per Parsons, C. J. So in Commonwealth v. Davis, 9 M. R. 415. "Upon an indictment for a conspiracy to cheat, the conspiracy is the gist of the offence, and the cheating is but aggravation."

When a felony or misdemeanour is in fact committed, a conspiracy to commit such felony or misdemeanour cannot be indicted and punished as a distinct offence. Commonwealth v. Kingsbury & al. 5 M. R. 106. The defendants were convicted, and there was a motion in arrest of judgment, because the offence charged and proved amounts to larceny, which being a felony, the conspiracy charged was merged. "Had the conspiracy not been effected, it might have been punished as a distinct offence; but a contrivance to commit a felony, and executing the contrivance, cannot be punished as an offence distinct from felony, when committed pursuant to it." Per Parsons, C. J. "The law is the same respecting misdemeanours." Id.

CONNECTICUT.—A combination or conspiracy may be proved by evincing a concurrent knowledge and approbation in the persons conspiring, of each others acts; and it is most usually done by proof of the separate acts of several persons, concentrating in the same purpose or particular object. The greater the secrecy that is observed, relative to the object of such concurrence, and the more apparent the similarity of the means employed to effect it, the stronger is the evidence of the conspiracy. 1 East. P. C. 37. In order to prove a conspiracy, the acts of the different conspirators are admissible, though acts to which the prisoners were no party. 6 T. R. 527. The King v. William Stone. This principle is recognised in 3 Esp. Rep. 194. Beal v. Thatcher,—where evidence of this nature was admitted by Lord Kenyon, as tending to prove a subsisting fraudulent connection between the defendant and one Johnson, whom he had recommended, &c.

NEW YORK.—In the case of the People v. Olcott, 2 Johns. Cases, 301, two



federacies whatsoever wrongfully to prejudice a third person are highly criminal at common law; as where divers persons confederate together by indirect means to impoverish a third person, or falsely and maliciously to charge a man with being

points of law were decided. 1. That the court may in their discretion in a criminal case, discharge a jury who are unable to agree on a verdict, and against the consent of the defendant; who may be brought to trial a second time for the same offence. And 2d. That where three persons were engaged in a conspiracy, and one of them died before trial, and another was acquitted, the survivor might be tried and convicted. A third point was also decided, which was applicable to that particular case, rather than to any general point or principle of law. The opinion of the court was delivered by Kent, J. As to the first point, he referred to the case of the People v. Denton, 2 Johns. Cases, 275, in which the same question was decided. He then went into an historical and learned statement of the opinions and discussions of the English judges, upon the question; to which the reader must be referred, and from which he will find, that both reason and the authorities are clearly in favour of the power of the court to discharge the jury when it shall appear that public justice, or the circumstances of the case, or of the prisoner, require it. The authorities referred to are, 1 Inst. 227, b. 3 Inst. 110. Foster, 32. Brooke's Corone, 42. Hawk. b. 2. c. 97. s. 1. 4 Black. Com. 360. Carthew. 465. The King v. Jeffs. Stra. 984. The learned judge here remarks, "that the position, generally denying the power of the court to discharge a jury sworn and charged in a criminal case, has originated, (probably without further examination or inquiry,) from a *dictum* to be found in the Institutes of Lord Coke, and that this *dictum* rests upon his single authority without the sanction of any judicial decision. On the contrary, there are many authorities admitting and establishing the power of the court to discharge the jury, even in capital cases." As in the case of *Ferrars*, cited in Sir T. Raymond, 84, which was an information for forgery. In 1 Vent. p. 69, which was a case of larceny. Foster, 271, a case of murder. Salk. 646, and Hale, P. C. vol. 2. p. 295, who, in direct opposition to Coke, says that the practice in his time had been common for the court, after the jury were sworn and charged, and evidence given, to discharge the jury, and remit the prisoner for another trial. In the case of the two Kinlocks, (Foster, 22 to 40,) the general question, touching the power of the court to discharge jurors, underwent a full and solemn discussion, and all the cases before mentioned were cited and examined, and the court came to this decision, (ten judges against one,) that the general rule, as laid down by Lord Coke, (that a jury sworn and charged by the court in cases of life or member, cannot be discharged, but ought to give a verdict,) had no authority to warrant it, and could not be universally binding; and that the question was not capable of being determined by any general rule; for that none could govern the discretion of the court in all possible circumstances.

This power is also recognised in Comb. 401. Kelynge, 26, 52. St. Tri. vol. 2, p. 710, 827.

Other instances where a jury may be discharged are also quoted by the learned judge. If the prisoner be found insane, (1 Hale, 35,) or in a fit, (Leach, 443,) or be taken in labour, (Foster, 76,) or if a juror escape from his fellows, (2 Hale, 296,) or if taken in a fit, or be intoxicated; in all these cases it has been held that a jury may be discharged, and the prisoner remanded for another trial. It is further added, "If the question in capital cases be doubtful, there is nothing to render it so in cases of *misdemeanors*"

the reputed father of a bastard child, or to maintain one another in any matter, whether it be true or false. (e) The conspiracy or unlawful agreement, though nothing be done in prosecution of it, is the \*gist of the offence. (f) The nature [\*1801]

e 1 Hawk. P. C. c. 72. s. 2.

f Reg. v. Best, 2 Ld. Raym. 1167. Rex v. Spragg, 2 Burr. 993. Rex v. Rispal, 3 Burr. 1321.

The power of the court in those cases is analogous to their power in civil cases; and they possess the same power and controul over the verdict, in awarding new trials, (6 T. R. 688. T. Jones, 163. 1 Lev. 9. 21. Vin. 478. Loft. 147. 4 Black. Com. 355. Ridg. 51.) and the party is entitled to a writ of error, as a matter of right. Laws of New York, vol. 1, 184. "If the court are satisfied that the jury have made long and unavailing efforts to agree; that they are so far exhausted as to be incapable of further discussion and deliberation, it then becomes a case of necessity, and requires an interference." The doctrine of compelling a jury to unanimity by the pains of hunger and fatigue, so that the verdict, in fact, be founded not on temperate discussion, but on strength of body, is a monstrous doctrine, that does not stand with conscience, but is altogether repugnant to a sense of humanity and justice." (Emlyn's Preface to the State Trials, pp. 6, 7.)

In Massachusetts this power of discharging a jury in capital cases, as well as in cases of misdemeanour, is now constantly exercised without hesitation or doubt. The question was first thoroughly examined in the Supreme Judicial Court, in the case of the Commonwealth v. Bowden, 9 M. R. p. 494. This was an indictment for highway robbery. The case is not fully reported. In addition to the authorities mentioned in the report as cited by the counsel for the government, a note of many others was prepared; but he was stopped by Parsons, C. J. and told that the court were entirely satisfied. The opinion of the court is not given at large; but it is remarked, as a part of that opinion, "that it would not be consistent with the genius of our government or laws, to use compulsory means to effect an agreement among jurors." Since this decision, the Supreme Judicial Court of Massachusetts have never doubted their power to discharge the jury without the consent of the prisoner, when it is fully ascertained that they cannot agree upon a verdict, as well in capital cases, as cases of felony not capital, and misdemeanours.

But prior to the decision in Boden's case, this power had not been exercised or admitted, in capital cases. The absurdity of denying the court this power, had been severely felt in the case of several persons tried for an atrocious murder in the county of Kennebec. The jury, by the right of peremptory challenge, were almost wholly of the prisoners' own selection. Several of them, however, were impartial and conscientious. After an elaborate trial of three days, it was found that the jury could not agree. They were kept together three days; during which time they were allowed moderate refreshment, but no spirituous liquor. They came into court every day, and declared that there was no prospect or even possibility of their ever agreeing upon a verdict; but they were informed that the court had no power to discharge them without the consent of the prisoners. On the third day they came into court again, and three of them declared that they believed the prisoners to be guilty, and that if they assented to a verdict of acquittal, it would be in violation of their judgments and consciences, and of their oath, to give their verdict "according to their evidence;" but that they should be *compelled* to assent to such a verdict, if the court had no power to relieve

of conspiracy, therefore, requires that more than one person should be concerned in it. In many cases an agreement to do a certain thing has been considered as the subject of an indictment for a conspiracy, though the same act, if done se-

them; and upon being told by the court, that they had no such power, they did assent to a verdict of not guilty. But it was most manifest to all present, that this assent was given from *necessity* and upon *compulsion*, and under the *duress* which they were then subjected to; and that it was given in direct opposition to their judgments, opinions and consciences, and for no other reason than to obtain their liberty. After such a case as this, can it be possible that an *American* judge or jurist will doubt the right of a court to discharge a jury, whenever it shall manifestly appear either that they *cannot* agree upon a verdict, or that other circumstances, in any case, shall render it necessary or expedient? (1)

The second ground on which the motion in this case of the People v. Olcott was made, is more immediately applicable to the subject of this chapter, viz. "that the conviction of two persons is requisite to constitute the crime of conspiracy. And *Aborn* being acquitted, and *Roe* dead, the defendant cannot legally be convicted." But the learned judge observes, that the case of the King v. Nichols, (Str. 1227,) is directly in point, that one conspirator may be convicted after the other is dead, before conviction. In the King v. Scott & Hames, (3 Burrows, 1262.) the same principle is recognised,—in the case of a riot, where six persons were indicted. Two of them were acquitted, and two died before trial. Lord Mansfield held, that the two convicted must have been guilty, together with one or the other of the persons who died before conviction, and the conviction of the two survivors was held good.

PENNSYLVANIA.—A combination is a *conspiracy* in law, whenever the act to be done has a necessary tendency to prejudice the public, or oppress individuals, by unjustly subjecting them to the power of the confederates, and giving effect to the purposes of the latter, whether of extortion or mischief. Every association therefore is criminal, whose object it is to raise or depress the price of labour beyond what it would bring if it were left without artificial excitement. Commonwealth v. Carlisle, Hab. Corp. before Gibson, J. Feb. 1821. 1 Journal of Jurisprudence, 225. Referred to in Wharton's *Dig. Conspiracy*, 4, 5.

In the case of Collins & others, in error, v. the Commonwealth, 3 Serg. & R. 220, it was decided, that "an indictment charging a conspiracy to defraud by means of false pretences and false writings, in the form and similitude of bank notes,—and stating the overt act to consist in altering a note purporting to be a promissory note, and to have been signed, &c. is sufficient. And also that an overt act, charged to be done by one conspirator, in *pursuance* of the conspiracy, is to be considered as the act of all. And further, that it is not necessary in such indictment to charge the actual defrauding of any person; passing with intent to defraud is sufficient. And such conspiracy is punishable under the acts of April 5, 1790, and April 4, 1807. But few at-

(1) Another method is said to have been adopted (in one of the middle states) to *compel* a juror to agree with his fellows, not quite so *complaisant*, but perhaps not less *painful* to the suffering juror.—Eleven of the jury were agreed after a few minutes deliberation; one of them only was obstinate. After using various methods to induce him to agree, the eleven agreed that the best argument they could use would be a *cow's skin*, and by the application of it obtained, very readily, the assent of the obstinate juror to their verdict.

parately by each individual without any agreement amongst themselves, would not have been illegal; as in the case of journeymen conspiring to raise their wages; each may insist on raising his wages if he can; but if several meet for the same purpose it is illegal, and the parties may be indicted for a conspiracy. (g) It has been said that perhaps few things are left so doubtful in the criminal law, as the point at which a combination of several persons, in a common object, becomes illegal. (h) It appears, however, to have been holden that if such persons illegally concur in doing an act, they may be guilty of conspiracy, though they were not previously acquainted with each other. (i)

Amongst the most flagrant instances of conspiracies, against the public justice of the kingdom, may be mentioned a case in which the defendants were charged with conspiracy, in causing a man to be executed for a robbery, which they knew

Conspiracies against the public justice of the

g By Grose, J., in *Rex v. Mawbey and others*, 6 T. R. 636. And see *Rex v. The Journeymen Taylors of Cambridge*, 8 Mod. 11. If one man alone be guilty of an offence, which, if practised by two, would be the subject of an indictment for a conspiracy, he is civilly liable in an action for reparation of

damages at the suit of the person injured. By Buller, J., in *Pasley v. Freeman*, 3 T. R. 53.

h 3 Chit. Crim. L. 1130.

i By Lord Mansfield in the case of the prisoners in the King's Bench, Hil. T. 26 Geo. III. 1 Hawk. P. C. c. 72. s. 2. in the notes.

thorities are cited by the judges, who gave their opinions in this case; but the reader will find them collected in the case of the *Commonwealth v. Judd & al.* 2 Mass. Rep. 329.

A conspirator may be convicted in the place, where the overt act is done, in pursuance of the conspiracy. And one who procures a misdemeanour to be committed, is guilty in the place where it is committed by his procuree. *The Commonwealth v. Gillespie & al.* 7 Surg. & R. 469. It makes no difference where the defendant resided; if he conspired with his agent to sell *New York* lottery tickets in *Pennsylvania*, and the agent effected the act, the object of the unlawful conspiracy, he is answerable criminally to the laws of *Pennsylvania*. In this offence there is no accessory. It must be recollected the conspiracy is a matter of inference, deducible from the acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them, and which are rarely confined to one place; and if the parties are linked in one community of design, and of interest, there can be no good reason why both may not be tried, where one distinct overt act is committed. For he who procures another to commit a misdemeanour is guilty of the fact in whatever place it is committed by the procuree. Per Duncan, J. in delivering the opinion of the court in the case last quoted.

VIRGINIA.—The words *probable cause*, are not necessary in an indictment for a conspiracy, nor in the ancient action or writ of conspiracy, (*Rastall's Entries*, 123. 126. F. N. B. 114 and 116,) nor are they necessary in an information. 1 Str. 193. The *Poullicen's* case, 9. Co. 56, was an action on the case for a combination, confederacy and agreement, *falsely* and *maliciously* to charge the plaintiff with a robbery, and to procure him to be indicted. There is no notice of this averment in that case; yet the plaintiff upon good consideration, had judgment. Other cases are cited to the same point, Per Tucker, J., in *Kirtly v. Deck*, 2d Munford's Rep. 10.

kingdom  
[\*1802]  
by agree-  
ing to make  
false  
charges  
and accu-  
sations.

he was innocent of, with intent to get into their possession the reward offered by act of parliament. (k) And it \*would have been equally a conspiracy, though the defendants had failed in their infamous design, and the man had been acquitted. Indeed one of the more ancient descriptions of conspiracy is "a consultation and agreement between two or more to appeal, or indict an innocent person falsely and maliciously of felony, whom, accordingly, they cause to be indicted or appealed; and afterwards the party is lawfully *acquitted* by the verdict of twelve men." (l) But of this description it is observed, that the lawful acquittal of the party grieved does not appear to be required in order to make the offenders guilty of conspiracy. (m) The description of conspirators in the old statute, 53 Edw. I. st. 2. (sometimes cited as 21 Edw. I.) is "that conspirators be they that do confeder or bind themselves by oath, covenant, or other alliance, that every of them shall aid and bear the other falsely and maliciously to indict, or cause to indict, or falsely to move and maintain pleas; and also such as cause children within age, to appeal men of felony, whereby they are imprisoned and sore grieved; and such as retain men in the country with liveries or fees for to maintain their malicious enterprizes; and this extendeth as well to the takers as to the givers; and to stewards and bailiffs of great lords, who, by their seigniory, office, or power, undertake to bear or maintain quarrels, pleas, or debates, that concern other parties than such as touch the estate of their lords or themselves." From which definition of conspirators it is said that it seems clearly to follow that not only those who actually cause an innocent man to be indicted, and also to be tried upon the indictment, whereupon

[\*1803] \*he is lawfully acquitted, are properly conspirators, but that those also are guilty of this offence, who barely conspire to indict a man falsely and maliciously, whether they do any act in prosecution of such conspiracy or not; for the words of the statute seem expressly to include all such confederacies under the notion of conspiracy, whether there be any prosecution or not. (n) But it is also said that since it does not appear to have been solemnly resolved that persons offending by a false and malicious accusation against another, are indictable upon this statute, it seems to be more safe and advisable to ground an indictment for such offence upon the common law than upon the statute. (o)

k Macdaniel and others (case of,) 1 Leach 45. And see Fost. 130. See also *ante*, 622. It should seem that the only objection to this being treated as a conspiracy is that which might arise from its being considered as a crime of the highest degree, in which the misdemeanor would be merged.

l 3 Inst. 143. 4 Black. Com. 36.

m 1 Hawk. P. C. c. 72. s. 2. In the case of Rex v. Spragg, 2 Burr. 998. Serj. Davy said, "There is a distinction between a writ

of conspiracy and an indictment for a conspiracy. In an action the damage is the gist of the action; and, therefore, the writ and declaration must charge 'that he was indicted and sustained damage:' but that is not necessary in an indictment; which is for an offence against the public. And this distinction explains Lord Coke's meaning in 3 Inst. 143."

n 1 Hawk. P. C. c. 72. s. 2.

o 1 Hawk. P. C. c. 72. s. 2.



A conspiracy of this kind appears, therefore, to consist in the unlawful agreement to injure a person by a false charge; though it be in no way prosecuted. And whether the conspiracy be to charge a temporal or an ecclesiastical offence on an innocent person, it is the same thing. (*p*)

The false charge need not be prosecuted.

It seems not to be any justification of a confederacy to carry on a false and malicious prosecution, that the indictment or appeal, which was preferred, or intended to be preferred, in pursuance of it, was insufficient, or that the court, wherein the prosecution was carried on or designed to be carried on, had no jurisdiction of the cause, or that the matter of the indictment did import no manner of scandal, so that the party grieved was, in truth, in no danger of losing either his life, liberty, or reputation. For notwithstanding the injury intended to the party against whom such a confederacy is formed may perhaps be inconsiderable, yet the association to pervert the law, in order to procure it, seems to be a crime of a very high nature, and justly to deserve the resentment of the law. (*q*) Therefore, on an indictment \*for wickedly and unlawfully conspiring to accuse another of taking hair out of a bag, without alleging it to be an unlawful and felonious taking, it was said by Lord Mansfield that the gist of the offence was the unlawful conspiracy to do an injury to another by a false charge, and that whether the conspiracy be to charge a man with criminal acts, or such only as may affect his reputation, it is sufficient. (*r*)

The confederacy to make false charges, &c. will be equally criminal though the proceedings intended to be instituted were defective.

[\*1804]

Neither is it any plea for one who is prosecuted for such an unlawful confederacy, that nothing more was intended by him, but only to give his testimony in a legal course of justice against the party to whose prejudice such confederacy is supposed to have been formed; for notwithstanding it may be said that it would be a great discouragement to legal proceedings to make persons liable to a criminal prosecution, for barely intending to give their evidence, and it would be a prejudging of a cause to try the truth of the testimony intended to be given in it before the cause itself is determined, yet the law will rather venture this mischief than suffer so flagrant a villainy to go unpunished. However, if there be any probability that the principal cause will ever be tried, it seems proper to apply to the court to stay the trial of the confederacy until the merits of the principal cause be determined. (*s*)

Such confederacy will be equally criminal, though the parties may say that they intended only to give testimony in a legal course of justice.

It is observed that it appears not only from the words of the statute, but also from the plain reason of the thing, that no confederacy whatsoever to maintain a suit can come within the words of the statute 33 Edw. I. st. 2. unless it be both

But the confederacy must be false and malicious;

*p* Reg. v. Best and another, 2 Ld. Raym. 1167, 1 Salk. 174.

*q* 1 Hawk. P. C. c. 72. s. 3.

*r* Rex v. Rispal, 1 Black. R. 368. 3 Burr. 1320.

*s* 1 Hawk. P. C. c. 27. s. 4.



and persons  
may con-  
sult to pro-  
secute a  
guilty per-  
son.

[\*1805]

Mawbey's  
case.

Conspiracy  
to pervert  
the course  
of justice,  
by produc-  
ing a false  
certificate  
of a high-  
way being  
in repair.

Argument  
of the coun-  
sel for the  
prosecu-  
tion,

false and malicious. (t) And several persons may lawfully meet together and consult to prosecute a guilty person, or one against whom there is probable cause of suspicion; but not to prosecute one that is innocent, right or wrong. (u)

\*In the following case, it was holden that a certificate by justices of peace, that an indicted highway is in repair, is a legal instrument, recognized by the courts of law, and admissible in evidence after conviction, when the court are about to impose a fine: and that, consequently, it was illegal to conspire to pervert the course of justice by producing a false certificate in evidence, to influence the judgment of the court. Upon shewing cause against a rule for arresting the judgment in this case, the counsel for the prosecution went at large into a discussion of the doctrine and nature of conspiracies. He said, that it follows from the very nature of the offence of conspiracy that there is no charge of any specific crime: but it consists wholly in the unlawful combination; and this will appear fully by adverting to the several sorts of conspiracy, to be found in the books. 1. Where the subject matter is neither *malum prohibitum*, nor *malum in se*, as referred to the individual: but the criminality in law arises wholly from the conspiracy. Such is an agreement to maintain each other, right or wrong; (x) or a combination amongst labourers or mechanics to raise their wages. (y) So where several conspired to hiss at the Birmingham theatre, Lord Mansfield held it indictable, although each might have done so separately. (z) So a combination between officers in the service of the East India Company, to resign their commissions, was held an illegal act; and, consequently, a resignation tendered under those circumstances was held not to be a determination of the service. (a) 2. Where the subject matter is not *malum prohibitum*, as referred to the individual, though *malum in se*: but the criminality in law arises from the conspiracy; and such as a malicious combination against a trader to ruin him in his trade. (b) So the taking up dead bodies, even though for the purposes of science in dissecting them, is now held an indictable offence \**per se*; (c) yet formerly it was not so considered; but even then it was held that an indictment lay for conspiracy to do so. (d) A false indictment is no crime as referred to the individual; (e) but a conspiracy for that purpose subjects the offenders to the villainous judgment. (f) The private slander of another by an individual is

[\*1806]

t 1 Hawk. P. C. c. 72. s. 7.

u Reg. v. Best and another, 1 Salk. 174.  
And see 1 Hawk. P. C. c. 72. s. 7.

x 9 Co. 56.

y 8 Mod. 10.

z Anon. B. R. 18 or 19 Geo. III.

a 4 Burr. 2472.

b 1 Stra. 144. 1 Lev. 125. Rex v. Eccles  
and others. B. R. 24 Geo. III. *post*. 1816.

c Rex v. Lynn 2 T. R. 733.

d Rex v. Young cited in 2 T. R. 733. This  
was an indictment for a conspiracy to prevent  
the burial of a corpse. And see a precedent  
for such a conspiracy, 2 Chit. Crim. L. 36.

e 1 Ed. III. st. 2. c. 11. 2 Black. Rep.  
1328, 9.

f *Ibid*. See as to the judgment. *post*.

not indictable; but conspiring to charge another with slanderous matter is so, (g) though no legal charge be actually preferred. (h) And in this latter case it was held that the quarter-sessions had jurisdiction over conspirators. It is the same with private immorality, which is only indictable when coupled with a conspiracy. (i) So two or more joining to do legal acts with a corrupt intent may be indicted. (k) And private deceipts, coupled with a conspiracy, are indictable on that account. (l) 3. The third head of conspiracy is where the subject matter is *malum prohibitum*, as referred to the individual, and the criminality in law is thereby aggravated if executed. Of this nature is the bare attempt to subvert religion, (m) or public justice; and the latter will apply to both descriptions of counts in the indictment. Such also is the endeavour to dissuade witnesses from giving evidence, (n) or the preparation of witnesses; (o) or the tampering with jurors. (p) Such are public frauds in trade; (q) or public cheats, (r) or deceipt, or collusion in the king's courts, or any consent thereto. (s) 4. Where there is a bare conspiracy unexecuted, (t) or where the conspiracy by the execution merges in a higher offence. (u) And he then argued that the offence charged against the defendants fell within the principles of the above cases. In giving his judgment in this case, Ashurst, J. said, "The principal question is, whether a conspiracy to pervert the course of justice by producing in evidence a false certificate be or be not a crime? It seems to me that a greater offence can hardly be stated than that of obstructing or perverting the course of justice, on which the lives and properties of all the subjects depend." And Grose, J. said, "It is laid down in some of the cases, that an attempt to persuade another not to give evidence in a court of justice is indictable; then it cannot be doubted but that an attempt to mislead the court by misrepresentation is equally criminal. The course of justice is perverted if the certificate of the justices be false. If they agree to certify that a road is in repair for the purpose of perverting the course of justice, it is a crime and indictable; and it is not necessary that they should know at the time of such agreement that the road is out of repair; it is sufficient that they did not know that the fact

[\*1807]

Opinion of the Judges.

g 1 Lev. 62. 1 Vent. 304.

h 1 Salk. 174. 1 Stra. 193. 3 Burr. 1320.

i 1 Salk. 392, 552. Burr. 1434, 1878. 2

Ld. Raym. 1031. 4 St. Tr. 515.

k Rex v. Robinson and others, 1 Leach 37.

l Mod. 321. 1 Wils. 41. 3 Burr. 1439.

m 6 Mod. 42, 301. 2 Burr. 1137. 2 Stra.

668.

n Fitzg. 66.

o 1 Hawk. P. C. c. 21. s. 15. 2 Stra. 904.

And see Rex v. Steventon and others, 2 East.

R. 362.

p Hob. 271. 3 Inst. 106. 2 Show. 1

q 1 Saund. 300. 1 Ld. Raym. 148. 1 Burr

510. Rex v. Joliffe, 4 T. R. 285. Co. Lit.

157.

r 1 Sess. Cas. 217. Comb. 16. 1 Sid. 409.

1 Vent. 13.

s 5 St. Tr. 486. 1 Latch. 202. 1 Roll.

Rep. 2. 2 Ld. Raym. 365. 1 Burnard, 330.

t 3 Edw. I. c. 29. 2 Inst. 212, 217.

u 1 Lev. 62, 125. 1 Vent. 304. 3 Burr.

1320. 1 Ld. Raym. 379. 1 Salk. 174. 1

Stra. 193. T. Raym. 417.

v 1 Ld. Raym. 711.

[\*1808]

which they certified to be true was true." And Lawrence, J. said, "The question is whether a conspiracy to do an act from which the public may receive any damage be or be not indictable? At first I thought this a very doubtful case, because it struck me that this was an act by which the public would not suffer, as the court at the assizes were not bound to receive the certificate of the defendants, it not being on oath. But on examination it appears that the practice of receiving the certificates of magistrates respecting \*the state of roads, has existed as far as the memory of living persons extends; and the books carry it still farther back. I have not been able to discover how or when the practice of receiving these certificates arose: but a practice that has been adopted in the courts at least as long back as the reign of Charles the First, goes a great way to shew what the law is upon the subject. And this is not the only instance of receiving certificates in evidence; certificates of bishops with respect to marriages are received; the customs of London are certified by the recorder; so formerly were certificates received from the captain of Calais; and in Cro. Eliz. 502, 3. this court said that they would give credit to the certificates of the Judges in Wales respecting the practice of ~~their~~ court, and that the custom of the court is a law in that court." (x)

De Berenger's case. Conspiracy to raise the price of the public funds, on a particular day by false rumours.

[\*1809]

In a very recent case it was holden to be an indictable offence, to conspire on a particular day by false rumours to raise the price of the public government funds, with intent to injure the subjects who should purchase on that day, and that the indictment was well enough, without specifying the particular persons who purchased as the persons intended to be injured, and that the public government funds of this kingdom might mean either British or Irish funds, which, since the Union, were each a part of the funds of the united kingdom. After the argument upon the motion in arrest of judgment, Lord Ellenborough, C. J. said, "I am perfectly clear that there is not any ground for the motion in arrest of judgment. A public mischief is stated, as the object of this conspiracy; the conspiracy is by false rumours to raise the price of the public funds and securities; and the crime lies in the act of conspiracy and combination to effect that purpose, and would have been complete, although it had not been pursued to its consequences, or the parties had not been able to carry it into effect. The purpose itself is mischievous, it strikes at the price of a vendible commodity \*in the market, and if it gives a fictitious price, by means of false rumours, it is a fraud levelled against all the public, for it is against all such as may possibly have any thing to do with the funds on that particular day." Bayley, J. said, "It is not necessary to

constitute this an offence, that it should be prejudicial to the public in its aggregate capacity, or to all the king's subjects: but it is enough, if it be prejudicial to a class of the subjects. Here then is a conspiracy to effect an illegal end, and not only so, but to effect it by illegal means, because to raise the funds by false rumours, is by illegal means. And the end is illegal, for it is to create a temporary rise in the funds without any foundation, the necessary consequence of which must be to prejudice all those who become purchasers during the period of that fluctuation. And by Dampier, J. "I own I cannot raise a doubt, but that this is a complete crime of conspiracy according to any definition of it. The means used are wrong, they were false rumours; the object is wrong, it was to give a false value to a commodity in the public market, which was injurious to those who had to purchase." (y)

In the argument upon the foregoing case, an authority was cited, where the defendants being acquitted of all but conspiring to impoverish the farmers of the excise, it was objected that there was no offence: but the court held it well, because the information shewed that the excise was parcel of the revenue of the crown, and so the impoverishment of the farmers of excise tended to prejudice the revenue of the crown. (z)

In a late case, it was holden, that a conspiracy to obtain money by procuring from the lords of the treasury the appointment of a person to an office in the customs, is a misdemeanor at common law. The counsel for the defendant proposed to argue, that the indictment was bad on the face of it, as it was not a misdemeanor at common law to sell, or to purchase an office like that of a coast walter; and that, however reprehensible such a practice might be, it could only be made an indictable offence by act of parliament. But Lord Ellenborough, C. J. said, "If that be a question it must be debated on a motion in arrest of judgment, or on a writ of error. But after reading the case of *Rex v. Vaughan*, (a) it will be very difficult to argue that the offence charged in the indictment is not a misdemeanor." And Grose, J. in passing sentence, likewise observed, that there could be no doubt that the indictment was sufficient, and that the offence charged was clearly a misdemeanor at common law. (b)

Precedents are to be met with in the books of indictments for conspiracies to commit riots. (c) And in a late case, it was said by a learned Judge, with respect to premeditated and systematic tumults at a theatre, that "the audience have certainly a right to express by applause or hisses the sensations which naturally present themselves at the moment; and

Conspiracy to impoverish the farmers of the excise.

Polman's case. Conspiracy to obtain money by procuring from the lords of the treasury the appointment of a person to an office in the customs.

Conspiracies to commit riots.

<sup>y</sup> *Rex v. De Berenger and others*, 3 M. and S. 67.

<sup>z</sup> *Rex v. Starling*, 1 Sid. 174.

<sup>a</sup> 4 Burr. 2494. *Ante*, 289.

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<sup>b</sup> *Rex v. Pollman and others*, 2 Campb. 229.

<sup>c</sup> 2 Chit. Crim. L. 506, note (f).

no body has ever hindered, or would ever question, the exercise of that right. But if any body of men were to go to the theatre with the settled intention of hissing an actor or even of damning a piece, there can be no doubt that such a deliberate and pre-concerted scheme would amount to a conspiracy, and that the persons concerned in it might be brought to punishment.” (*d*)

Conspiring  
to marry  
paupers, in  
order to  
charge a  
parish.

[\*1811]

Several cases have occurred in which the conspiring and contriving, by sinister means, to marry a pauper of one parish to a settled inhabitant of another, in order to bring a charge upon it, have been considered as indictable offences. (*e*) \*It is observed respecting a conspiracy of this kind, that, considering the offence as a prostitution of the sacred rites of marriage, for corrupt and mercenary purposes, and that, by artful and sinister means, persons are seduced into a connection for life without any inclination of their own, and contrary to that freedom of choice which is peculiarly required in forming so close an union, and on which the happiness of them both so entirely depends; and this for the sake of some gain or saving to others who bring about such marriage; in this light it seems a fit ground for criminal cognizance, not only as being a great oppression upon the parties themselves more immediately interested, but as an offence against society in general; being an abuse of that institution by which society is best continued and legal descents preserved, and a perversion of the purposes for which it was ordained. (*f*) But in a case where, upon an indictment against parish-officers for a conspiracy of this kind, it appeared that a man of one parish having gotten a woman with child belonging to another, the defendants had agreed with the man, (who was of the age of 29,) with the approbation of his father, to give him two guineas if he would marry the woman, and that he afterwards married her on such condition, and received the money from the defendants immediately after the marriage; and it was also sworn both by the man and the woman, that they were willing to marry at the time; Buller, J., directed an acquittal, notwithstanding the proof of the money having been given to procure such consent, and this after the putative father had been taken up under a magistrate’s warrant, and was in custody of the overseers. And that learned Judge held it necessary, in support of such an indictment, to shew that the defendants had made use of some violence, threat, or contrivance, or used some sinister means to procure the marriage without the voluntary consent or inclination of the parties themselves; and that the act of marriage being in itself \*lawful, a conspi-

*d* By Mansfield, C. J. in *Clifford v. Brandon*, 2 Campb. 369.

\* *Rex v. Tarrant*, 4 Burr. 2106. *Rex v.*

*Herbert and others*, 1 East. P. C. c. 11. s. 11. p. 461. *Rex v. Compton and others*, Cald. 246. *f* 1 East. P. C. c. 11. s. 11. p. 461.



racy to procure it could only amount to a crime by the practice of some undue means. (x)

In a case where the indictment stated the marriage to have been procured by threats and menaces against the peace, &c. it was holden to be sufficient; without averring in terms, that the marriage was against the will or consent of the parties, though that must be proved. (h)

Upon an indictment for conspiring together, and giving the husband money to marry a poor helpless woman, who was an inhabitant of B. in order to settle her in the parish of A., where the husband was settled, judgment was arrested, because it was not averred that she was last legally settled in B. (i) But it is observed, that it seems to be perfectly immaterial where the woman's settlement was, if it were not in A.; provided that fact distinctly appeared. (k) It is further said, however, that it is usual to aver the settlements of the parties in their respective parishes; and also that the woman was chargeable to her own parish at the time; though this latter has never been adjudged to be necessary; nor seems to be required according to the general rules which govern the offence of conspiracy. (l) It should seem that in such cases both the purpose and the means used are clearly unlawful.

The frauds practised by swindlers may sometimes be indictable as conspiracies. In a case which has been mentioned in a former part of this Work, (m) where the prisoner \*had been acquitted upon a charge of forgery, he was afterwards indicted with two of his associates for a conspiracy to defraud. The indictment charged that the defendants, John Hevey, Richard Beatty, and Bryan M'Carty, fraudulently and unlawfully conspired that Beatty should write his acceptance to a certain paper-writing, purporting to be a bill of exchange, &c. (the tenor of which was set out,) in order that Hevey might, by such acceptance, and of the name M'Carty being indorsed on the back thereof, negotiate the said paper-writing as a good bill of exchange, truly drawn at Bath, by one Jer. Connell, for Smith and Co. as partners in the business of bankers, under the stile of *Bath Bank*, as persons well known to them the said defendants, and thereby fraudulently to obtain from the king's subjects goods and monies; that Beatty, in pursuance of such conspiracy and agreement, did fraudulently and unlawfully write his acceptance to the said paper-writing to the tenor following; viz. Accepted, 20 Nov. —81. R. B., well knowing the firm

Conspiracies to defraud.

[\*1813]

Hevey's case.

Conspiring to make a fraudulent acceptance of a bill of exchange.

g *Rex v. Fowler and others*, cor. Buller, J., Taunton Spr. Ass. 1798. 1 East. P. C. c. 11. s. 11. p. 461. And the learned Judge said that this point had been so ruled several times by several Judges.

h *Rex v. Parkhouse and Tremlet*, cor. Bul-

ler, J., Exeter Sum. Ass. 1792. 1 East. P. C. c. 11. s. 11. p. 462.

i *Rex v. Edwards and others*, 8 Mod. 320.

k 1 East. P. C. c. 11. s. 11. p. 462.

l *Ibid.*

m *Ante*, 1420, 1422.



of Smith and Co., to be fictitious; that the defendants procured the indorsement "B. M'Carty," to be written on the same; and that the said Hevey, in pursuance of such fraudulent conspiracy, did utter the said paper-writing to one S. Read, as and for a good bill of exchange, truly drawn, &c. and accepted by the said Beatty as a person able to pay the said sum of 30*l.*, in order to negotiate the same, and by means thereof did fraudulently obtain a gold watch, value twelve guineas, and 7*l.* 8*s.* in money; whereas, in truth, at the time of drawing, accepting, and uttering the said bill, there were no such persons as Smith and Co. in the business of bankers at Bath, and the said Beatty was not of sufficient ability to pay the said 30*l.*, they, the defendants, well knowing the same, &c.; whereby they defrauded the said S. Read, of the said goods and monies. The facts so charged being fully proved, the defendants were convicted. (*n*)

[\*1814]

Roberts's  
case.  
Conspiracy  
to defraud  
tradesmen.

Conspiracy  
to barter  
unwhole-  
some wine.  
Macarty  
and For-  
den-  
borough's  
case.

\*In a case of recent occurrence, the defendants were convicted on an indictment which charged them with a conspiracy to cause themselves to be believed persons of large property, for the purpose of defrauding tradesmen. (*o*)

The selling unwholesome provisions is, as we have seen, an indictable offence; and the following case of bartering bad and unwholesome wine appears to have been treated as a conspiracy. The indictment charged that the defendants falsely and deceitfully intending to defraud Thomas Chowne, of divers goods, &c. together deceitfully bargained with him to barter, sell, and exchange a certain quantity of pretended wine, as good and true new Portugal wine of him the said Fordenborough, for a certain quantity of hats of him the said Chowne; and that, upon such bartering, &c. the said Fordenborough pretended to be a merchant of London, and to trade as such in Portugal wines, when in fact he was no such merchant, nor traded as such in wines; and the said Macarty, on such bartering, &c. pretended to be a broker of London, when in fact he was not; and that the said Chowne, giving credit to the said fictitious assumptions, personating, and deceits, did barter, sell, and exchange, to Fordenborough, and did deliver to Macarty, as the broker between the said Chowne and Fordenborough, for the use of Fordenborough, a certain quantity of hats, of a certain value, for so many hogsheads of the pretended new Portugal wine; and that Macarty and Fordenborough, on such bartering, &c. affirmed that it was true new Lisbon wine of Portugal, and was the wine of Fordenborough, when in fact it was not Portugal wine, nor was it drinkable or wholesome, nor did it belong to Fordenborough, to the great deceit and

*n* Hevey, Beatty, and M'Carty, (case of,) 1782. 2 East. P. C. c. 19. s. 6. p. 358. note (*a*.)

*o* Rex v. Roberts and others, 1808. *or* Ld. Ellenborough, C. J. 1 Campb. 399.

damage of the said Chowne, and against the peace, &c. (p) It is observed of this indictment, which was for a cheat at common law, that though it did not charge that the defendants "conspired, eo nomine: yet it charged that they together, &c. did the acts imputed to them, which might be considered to be tantamount. (q) 'The case was considered as one of doubt and difficulty; but it seems that judgment was ultimately given for the crown, on the ground that the offence was conspiracy.'" (r) [\*1815]

We have seen that all confederacies, wrongfully to prejudice a third person, are considered as highly criminal at common law. (s) And where a woman, living in the service of her master, conspired with another man that he should personate her master, and in that character should solemnize a marriage with her, which was accordingly done, for the purpose of afterwards raising a specious title to the property of the master; the gist of the indictment was for the conspiracy, and the conviction was founded on that ground. And it was considered in this case that, though no actual injury were proved, yet it was the province of the jury to collect, from all the circumstances of the case, whether there was not an intention to do a future injury to the person whose name was assumed. (t)

Conspiracy  
to solemn-  
ize a  
marriage.

The seduction of a young woman may be attended with such circumstances as to be indictable as a conspiracy. A case is reported where Lord Grey and others were charged, by an information at common law, with conspiring and intending the ruin of the Lady Henrietta Berkeley, then a virgin unmarried, within the age of eighteen years, one of the daughters of the Earl of Berkeley, (she being under the custody, &c. of her father,) and soliciting her to desert her father, and to commit whoredom and adultery with Lord Grey, who was the husband of another daughter of the Earl of Berkeley, sister of the Lady Henrietta, and \*to live and cohabit with him: and further, the defendants were charged that, in prosecution of such conspiracy, they took away the Lady Henrietta at night, from her father's house and custody, and against his will, and caused her to live and cohabit in divers secret places with Lord Grey; to the ruin of the lady, and to the evil example, &c. The defendants were found guilty; though there was no proof of any force, but on the contrary it appeared that the lady, who was herself examined as a witness, was desirous of leaving her father's house, and concurred in all the measures taken for her departure and subsequent concealment. It was not shewn that any artifice was used to prevail on her to leave her father's

Conspiracy  
to seduce  
a young  
woman

p Reg. v. Macarty and Fordenborough, 2 Ld. Raym. 1179. 2 East. P. C. c. 18. s. 5. p. 823.

q 2 East. P. C. c. 18. s. 5. p. 824.

r 2 East. *ibid.* And see *ante*, 1372.

s *Ante*. 1800.

t Taylor and Robinson, (case of,) 1 Leach 37. 2 East. P. C. c. 20. s. 5. n. 1010.

[\*1816]

house: but the case was put upon the ground that there was a solicitation and enticement of her to unlawful lust by Lord Grey, who was the principal person concerned, the others being his servants, or persons acting by his command, and under his controul. (u)

Conspiracy to impoverish a man in his trade.

A case is reported where several persons were convicted on an indictment which charged them with conspiring to impoverish one H. B., a tailor, and to prevent him, by indirect means, from carrying on his trade. (x) This, however, appears to have been considered as a conspiracy in restraint of trade, and so far a conspiracy to do an unlawful act affecting the public. (y)

But an indictment will not lie for conspiring to commit a civil trespass. Turner's case.

[\*1817]

In a late case it was holden, that an indictment will not lie for conspiring to commit a civil trespass upon property, by agreeing to go, and by going into, a preserve for hares, the property of another, for the purpose of snaring them; though it be alleged to be done in the night time, and that the defendants were armed with offensive weapons, for the purpose of opposing resistance to any endeavours to apprehend or obstruct them. And Lord Ellenborough, C. J., in pronouncing the judgment of the court, said, "I should be sorry that the cases in conspiracy against individuals, which have gone far enough, should be pushed still farther. I should be sorry to have it doubted whether persons agreeing to go and sport upon another's ground, in other words, to commit a civil trespass, should be thereby in peril of an indictment for an offence which would subject them to infamous punishment." (z)

Nor will an indictment lie for a conspiracy to cheat and defraud a man by selling him an unsound horse. Pywell's case.

In a later case the defendants were charged by the indictment with conspiring to cheat and defraud General Maclean, by selling him an unsound horse. It appeared that one of the defendants, named Pywell, had advertised the sale of horses, undertaking to warrant their soundness; and that, upon an application by General Maclean, at Pywell's stables, another of the defendants stated to him that he had lived with the owner of a horse which he then shewed to the general; that he knew the horse to be perfectly sound, and, as the agent of Pywell, would warrant him to be sound. General Maclean purchased the horse, taking a receipt, in which the horse was mentioned as warranted sound, and to be returned if not approved of within a week. It was discovered very soon after the sale, that the animal was nearly worthless. Upon these facts, Lord Ellenborough, C. J. was of opinion that the case did not assume the shape of a conspiracy, and that the evidence would not warrant any

u Rex v. Ld. Grey and others, 3 St. Tri. 519. 1 East. P. C. c. 11. s. 10. p. 460.

x Eccles's case, 1 Leach 274.

y By Ld. Ellenborough, C. J., in Rex v. Turner, 13 East. 228.

z Rex v. Turner. 13 East. 228. 231. But

qu. as to that which is reported in this case, (p. 230.) to have been said by Lord Ellenborough, in the course of the argument, viz. that "all the cases in conspiracy proceed upon the ground that the object of the combination is to be effected by some falsity."

proceeding beyond that of an action on the warranty, for the breach of a civil contract. And his Lordship said that, if this were to be considered as an indictable offence, then, instead of the actions which had been brought on warranties, the defendants ought to have been indicted as cheats: and that no indictment, in a case like this, could be maintained, without evidence of concert between the parties to effectuate a fraud. The defendants were accordingly acquitted. (a)

[\*1818]

It has been ruled that an indictment cannot be supported for a conspiracy to deprive a man of the office of secretary to an illegal unincorporated trading company. Lord Ellenborough, C. J., said that, the society being certainly illegal, to deprive an individual of an office in it could not be treated as an injury: and that when the prosecutor was secretary to the society, instead of having an interest which the law would protect, he was guilty of a crime. (b)

An indictment will not lie for conspiring to deprive a man of the office of secretary to an illegal trading company.

Combinations amongst victuallers or artificers to raise the price of provisions or any commodities, or the rate of labour, have been, in some cases, made liable to severe punishment by the enactments of particular statutes. The punishment for such offences by the statute 2 & 3 Edw. VI. c. 15. was forfeiture of 10*l.*, or twenty days' imprisonment, with an allowance of only bread and water, for the first offence; 20*l.* or the pillory, for the second; and 40*l.* for the third, or else the pillory, loss of one ear, and perpetual infamy. The statute 36 Geo. III. c. 111. relates to combinations by journeyman paper-makers: and there are other statutes which relate to persons employed in different kinds of trades. (c) The statute 39 and 40 Geo. III. c. 106. relates to unlawful combinations of journeymen and workmen in general, making them offences punishable by summary proceedings before justices of the peace. (d)

Combinations amongst victuallers and artificers.

Combinations by journeymen and workmen.

\*We have seen that from the nature of conspiracy it is an offence which cannot be charged as having been committed by one person only. (e) And upon this ground it has been holden that no prosecution for a conspiracy can be maintained against a husband and wife only because they are es-

Of the prosecution and proceedings. [\*1819]

a *Rex v. Pywell and others*, 1 Stark. R. 402.

b *Rex v. Stratton and others*, *cor.* Ld. Ellenborough, C. J., 1 Campb. 549 in the notes.

c See 5 Burn. Just. tit. *Servants*.

d 39 & 40 Geo. III. c. 106. s. 2, 3, 4, 5. And see Burn. Just. tit. *Servants*, Sect. xxvii. In *Rex v. The Journeymen Tailors of Cambridge*, 8 Mod. 11. it was holden that journeymen confederating and refusing to work, unless for certain wages, might be indicted for a conspiracy, notwithstanding the statutes which regulated their work and wages did not direct each mode of prosecution. But

see, as to the prosecution of some at least of these offences, the fifth section of the 39 & 40 Geo. III. c. 106. So much of the schedule of that act as related to the forms of conviction, was repealed by the 41 G. III. c. 38. which gives other forms in their stead. In the case of *Rex v. Niell and others*, 6 East. 417. it was holden that a conviction on this statute of 39 & 40 Geo. III. was bad for alleging generally that the defendants were concerned in entering into a certain agreement, &c. without stating what the agreement was.

e *Ante*, 1801

teemed but one person in law, and presumed to have but one will. (*f*) So if all the defendants, who are prosecuted for a conspiracy, be acquitted, and the conspiracy be not stated as having been had with persons unknown, the acquittal of the rest is the acquittal of that one also. (*g*) But if two persons be indicted for a conspiracy, and one only of them appear and take his trial, he may be found guilty, though the other defendant be absent, and has not pleaded: (*h*) and this, although the other conspirator named in the indictment was dead before the indictment was preferred. (*i*)

Statements  
in the in-  
dictment.

[\*1820]

With respect to the statement of the charge in the indictment it may be observed that though it is usual to state the conspiracy, and then shew that in pursuance of it certain overt acts were done, it is sufficient to state the conspiring alone. (*k*) It need not be averred in the indictment that the prosecutor was innocent of the crime imputed to him by the conspirators. (*l*) And in a case of a conspiracy to charge a person with being the father of a bastard child, it was holden not to be necessary to aver that the prosecutor was \*not the father; especially when the words of the indictment were “did *falsely* conspire *falsely* to charge, &c.”; the principle being that innocence must be intended till the contrary appears. (*m*) And an indictment for a conspiracy was holden to be good, although it was not alleged *in the charge itself* that the defendants conspired *falsely* to indict the prosecutor, and although it did not appear of what *particular crime or offence* they conspired to indict him, but only in *general* that the defendants did wickedly and maliciously conspire to indict and prosecute the prosecutor for a crime or offence liable to be capitally punished by the laws of this kingdom. (*n*)

Not neces-  
sary to  
state that  
the defend-  
ants knew,  
&c.

In a case where the defendants were indicted for conspiring to pervert the course of justice by producing in evidence a false certificate of justice of peace, it was holden not to be necessary to set forth in the indictment that the defendants knew, at the time of the conspiracy, that the contents of the certificate were false: on the ground that if persons, with intent to obstruct the course of justice, conspire to state a fact at all events as true, which they do not know to be true, it is criminal; and that the defendants were bound to have known that the fact was true which they agreed to certify as such. (*o*)

Not neces-

Where the act is in itself illegal, it is not necessary to

*f* 1 Hawk. P. C. c. 72. s. 3.

*g* *Id. Ibid.* 3 Chit. Crim. L. 1141.

*h* Rex v. Kinnersley and Moore 1 Str. 193.

*i* Rex v. Nicholls and Bygrove, 2 Str. 1227.

*k* Reg. v. Best, 2 Ld. Raym. 1167. 1 Salk. 174. 3 Chit. Crim. L. 1143.

*l* Rex v. Kinnersley and Moore, 1 Str. 193.

*m*. Reg. v. Best and another, 1 Salk. 174.

*n* Rex v. Spragg and another, 2 Burr. 995.

*o* Rex v. Mawbey and others, 6 T. R. 619. *Ante*, 1805, Lawrence, J., that it was not unlike the case of perjury, where a man swears to a particular fact without knowing at the time whether the fact be true or false; which is as much perjury as if he knew the fact to be false, and equally indictable. *Ante*, 1754.



state the means by which the conspiracy was effected. Thus, where the indictment charged that the defendants conspired together by indirect means to prevent one H. B. from exercising the trade of a tailor, and it was contended that it should have stated the fact on which the conspiracy was \*founded, the means used for the purpose, Lord Mansfield, C. J. said "The conspiracy is stated and its object; it is not necessary that any means should be stated:" and Buller, J., said, "If there be any objection, it is that the indictment states too much; it would have been good certainly if it had not added 'by indirect means,' and that will not make it bad." (p) And in a late case where the indictment charged that the defendants conspired, by divers false pretences and subtle means and devices, to obtain from A. divers large sums of money, and to cheat and defraud him thereof; it was holden that, the gist of the offence being the conspiracy, it was quite sufficient only to state that fact and its object, and not necessary to set out the specific pretences. Bayley, J., said that when parties had once agreed to cheat a particular person of his monies, although they might not then have fixed on any means for that purpose, the offences of conspiracy was complete. (q) But where the act only becomes illegal from the means used to effect it, the illegality of it should be explained by proper statements; as in the cases which have been cited of conspiracies to marry paupers. (r)

say to state the means by which the conspiracy was effected. [\*1821]

The technical averment of the agreement and conspiracy, generally used in the indictment, charges that the defendants "did conspire, combine, confederate, and agree together:" but it is said that other words of the same import seem to be equally proper. (s) To the counts for a conspiracy may be joined such other counts as the circumstances of the case may seem to require (not charging a felony) though they do not include a charge of conspiracy. (t)

Technical averment of conspiracy.

It has been holden that in an indictment for conspiracy \*the venue must be laid where the conspiracy was, and not where the result of such conspiracy was put in execution. (u) But in a late case it was said by the court, that there seemed to be no reason why the crime of conspiracy, amounting only to a misdemeanor, might not be tried, wherever one distinct overt act of conspiracy was in fact committed, as well as the crime of high treason, in compassing and imagining the king's death, or in conspiring to levy war. (x) And a case was cited in which the trial proceeded upon this principle; and in which, though no proof of actual conspiracy, embracing all

Place where the offence may be tried. [\*1822]

p Exche's case in note (d) to *Rex v. Turner*, 13 East, 230. *Ante*, 1816.

q *Rex v. Gill*, 2 Barnw. & Ald. 204

r *Ante*, 1841.

s 3 Chit. Crim. L. 1145.

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t See the judgment of Lord Ellenborough, C. J., in *Rex v. Johnson*, 3 M. & S. 550.

u Reg. t. Best and another 1 Salk. 174.

x *Rex v. Brisac and Scott*, 4 East. 171.



the several conspirators, was attempted to be given in Middlesex, where the trial took place, and though the individual actings of some of the conspirators were wholly confined to other counties than Middlesex; yet the conspiracy as against all having been proved, from the community of criminal purpose, and by their joint co-operation in forwarding the objects of it, in different places and counties, the locality required for the purpose of trial was holden to be satisfied by overt acts, done by some of them, in prosecution of the conspiracy in the county where the trial was had. (*y*)

Jurisdiction of the justices at quarter-sessions.

The offence of conspiracy may be tried by justices of peace in their quarter-sessions. In a case where the question of their jurisdiction was raised, no authority being cited either on the one side or on the other, the court decided in favour of their jurisdiction, upon general principles; saying, that a conspiracy was a trespass, and that trespasses were indictable at sessions, though not committed with force and arms. (*z*)

[\*1823]

Evidence. How far the acts or words of one conspirator evidence against the others.

\*An able writer upon the law of evidence lays down the following doctrine with respect to the acts or words of one conspirator being evidence against the others. Where several persons are proved to have combined together for the same illegal purpose, any act done by one of the party, in pursuance of the original concerted plan, and with reference to the common object, is in the contemplation of law the act of the whole party; and, therefore, the proof of such act, would be evidence against any of the others, who were engaged in the same conspiracy; and further, any declarations, made by one of the party at the time of doing such illegal act, seem not only to be evidence against himself, as tending to determine the quality of the act, but to be evidence also against the rest of the party, who are as much responsible as if they had themselves done the act. But what one of the party may have been heard to say at some other time, as to the share which some of the others had in the execution of the common design, or as to the object of the conspiracy, cannot, it is conceived, be admitted as evidence to affect them on their trial, for the same offence. (*a*)

Wife of one defendant no witness for the others.

On a prosecution against several persons for a conspiracy, the wife of one of the defendants has been holden not to be a competent witness for the others; a joint offence being charged, and an acquittal of all the other defendants being a ground of discharge for the husband. (*b*)

Proof of the conspiracy.

It is not necessary, in support of an indictment for a conspiracy, to prove the actual fact of conspiracy; which may be

*y* Rex v. Bowes, K. B. Trin. T. 1787, cited by Grose, J. in pronouncing the opinion of the court in Rex v. Brisac and Scott, *ante*, note (*x*)

*z* Rex v. Rispoli, 3 Burr. 1320. 1 Black. R. 368. 1 Burn. Just. Conspiracy, Sect. 1.

The point was so decided in an earlier case, Rex v. Edwards and others, 8 Mod. 321.

*a* Phill. on Evid. 76, 77.

*b* Rex v. Lockyer and others, cor. Lord Ellenborough, C. J. 5 Esp. N. P. R. 107. Rex v. Frederick and another. 2 Str. 1094

collected from the collateral circumstances of the case. (c) In a case where a husband, wife, and their servants, were indicted for a conspiracy to ruin the trade of the prosecutor, who was the king's card-maker, the evidence against them \*was, [\*1824] that they had at several times given money to the prosecutor's apprentices, to put grease into the paste; which had spoiled the cards; but there was no account given that ever more than one at a time was present, though it was proved they had all given money in their turns: it was objected that this could not be a conspiracy; on the ground that several persons might do the same thing, without having any previous communication with each other. But it was ruled that the defendants being all of a family, and concerned in making of cards, it would amount to evidence of a conspiracy. (d) And it appears also to have been considered that if a banker permits a sum of money to be lodged at his house, to be paid over, for corruptly procuring an appointment under government, he may be indicted for a conspiracy along with those who are to procure the appointment, and receive the money. (e)

It appears to have been ruled, that upon an indictment for a conspiracy the prosecutor may go into general evidence of its nature, before it is brought home to the defendants. The indictment charged the defendants, who were journeymen shoe-makers, with a conspiracy to raise their wages; and evidence was offered on the part of the prosecution of a plan for a combination amongst the journeymen shoe-makers, formed and printed several years before, regulating their meetings, subscriptions, and other matters for their mutual government in forwarding their designs. This evidence was objected to by the counsel for the defendants; but Lord Kenyon, C. J. said that if a general conspiracy existed, general evidence might be given of its nature, and the conduct of its members, so as to implicate men who stood charged with acting upon the terms of it years after those terms had been established, and who might reside at a great distance from the place where the general plan was carried on: and his lordship, therefore, permitted a \*person who was a member of this society, to [\*1825] prove the printed regulations and rules of the society, and that he and others acted under them, in execution of the conspiracy charged upon the defendants, as evidence introductory to the proof that they were members of such society, and equally concerned; but he observed, that it would not be evidence to affect the defendants until they were made parties to the same conspiracy. (f)

General evidence of the nature of the conspiracy.

c. *Rex v. Parsons and another*, 1 Black. R. 362.

d. *Rex v. Cope and others*, 1 Str. 144.

e. *Rex v. Pollman and others*, 2 Campb. 233.

f. *Rex v. Hammond and Webb*, 2 Esp. N.

P. R. 718. Lord Kenyon referred to the cases of the state trials in the year 1745, where from the nature of the charge it was necessary to go into evidence of what was going on at Manchester, and in France, Scotland, and Ireland, at the same time.

Cumulative instances of fraud permitted to be given in evidence.

In a case where the indictment charged the defendants with conspiring to cause themselves to be believed persons of large property for the purpose of defrauding tradesmen, evidence was given of their having hired a house in a fashionable street, and represented themselves to one tradesman employed to furnish it as people of large fortune; and then a witness was called to prove that at a different time they had made a similar representation to another tradesman. The evidence of this witness was objected to on the ground that it was not competent to the prosecutor to prove various acts of this kind, and that he was bound to select and confine himself to one. But Lord Ellenborough, C. J. said, "This is an indictment for a conspiracy to carry on the business of common cheats: and cumulative instances are necessary to prove the offence." (g)

The court will take judicial notice of a war.

In the case mentioned in this Chapter, of a conspiracy to raise the price of the public funds by false rumours, it was holden that the court will take judicial notice that a war exists between this country and a foreign state, such war having been recognized in different acts of parliament; and, therefore, that an allegation to that effect need not be proved. (h)

[\*1826]

Averment as to one of the conspirators not proved.

\*Where an indictment against A., B., C., and D., charged that they conspired together to obtain, "*viz.* to the use of them the said A., B., and C., and certain other persons, to the jurors unknown," a sum of money for procuring an appointment under government; and it appeared that D. (although the money was lodged in his hands, to be paid to A. and B. when the appointment was procured), did not know that C. was to have any part of it, or was at all implicated in the transaction: it was holden, that the averment concerning the application of the money was material, though coming under a *viz.*; and that as to D. the conspiracy was not proved as laid. (i)

Point respecting cross examination where one defendant only calls witnesses.

In a recent case, a point arose as to the extent to which the counsel for the prosecution in a case of conspiracy might cross-examine a witness, called by only one of several defendants. The indictment was against A., B., and C.; and after the case for the prosecution was closed, C. only called a witness, whom he examined as to a conversation between himself and A.; and it was ruled, that the counsel for the prosecution might cross-examine such witness, as to any other conversation between A., and C. although the evidence should tend chiefly to criminate A. (k)

Punishment.

In former times, persons convicted of a conspiracy at the suit of the king, to accuse another person of a capital offence, were liable to receive what was called the *villanous judgment*,

g Rex v. Roberts and others, 1 Campb. 399. *Ante*, 1814.

h Rex v. De Berenger, 3 M. and S. 67. *Ante*, 1800, 1809.

i Rex v. Pollman and others, 2 Campb. 231.

k Rex v. Krochl and others, 2 Stark. N. P. R. 343.

that is, to lose their *liberam legem*, whereby they are discredited and disabled as jurors, or witnesses; to forfeit their goods and chattels, and lands for life; to have those lands wasted, their houses rased, their trees rooted up, and their bodies committed to prison. (*l*) But this judgment was not inflicted upon those who were convicted only of conspiracies of a less aggravated \*kind, at the suit of the party: and for some time past [\*1827] it appears to have been the better opinion, that the villanous judgment is by long disuse become obsolete, not having been pronounced for some ages; and that the punishment for conspiracies in general is, as in the case of other misdemeanors, by fine, imprisonment, and sureties for the good behaviour at the discretion of the court. (*m*)

A consequence of the attain of conspiracy, where the party was subject to the villanous judgment, appears to have been incompetency as a witness. (*n*) But this consequence seems not to have attached to other cases of conspiracy at the suit of the party. (*o*) And in a late case in the Admiralty court, which underwent much discussion, Sir W. Scott determined on great consideration that a conviction for a conspiracy to commit a fraud, would not render an affidavit of the convict inadmissible. (*p*)

In conclusion of this chapter, it may be mentioned, that \*after a conviction for a conspiracy, the defendants must be present in court when a motion is made on their behalf, in arrest of judgment. (*q*) And also that upon a motion for a new trial after such conviction, all the defendants must be present. (*r*) But where an indictment has been removed into the court of King's Bench, and set down for argument, it does not appear to be necessary, that the defendants should appear in court upon the argument, the proceeding being in the nature of a special verdict. (*s*)

Incompetency as a witness.

All the defendants must be present in court upon a motion in arrest of judgment, or for a new trial.

*l* 1 Hawk. P. C. c. 72. s. 9. 4 Black. Com. 136.

*m* *Id. Ibid.* The pillory was also very commonly a part of the punishment until taken away by the 56 Geo. III. c. 138. See *ante*, 211, note (*n*). In a case where the defendants were convicted on an information for a conspiracy to take away the character of one Kempe, and accuse him of murder, by pretended conversations and communications with a ghost that answered by knocking and scratching in Cock-lane, &c. they received the following judgment:—Richard Parsons, (the father of the child, who was the principal agent in the pretended communication,) to stand thrice in the pillory, and be imprisoned two years; Eliz. Parsons the mother, to be imprisoned one year; Mary Fraser, a servant who was aiding and assisting, was sent to the house of correction, to hard labour

for six months; Moore, the curate of the parish, and one James, were discharged on paying the prosecutor 300*l.*, and his costs, which were nearly as much more. Brown who had published a narrative, and one Day the printer of a newspaper, had previously made their peace with the prosecutor.

*n* Co. Lit. 66. 2 Hale 277. 1 Hawk. P. C. c. 72. s. 9.

*o* 2 Hale 277. Carth. 416. 1 Hawk. P. C. c. 72. s. 9.

*p* In the case of the Ville de Varsovie and others, 1817. Phill. on Ev. 24.

*q* Rex v. Spragg and another, 2 Burr. 929. 1 Black. R. 209.

*r* Rex v. Teal and another, 11 East. 307. Rex v. Askew, 3 M. and S. 9. Rex v. Lord Cochrane, 3 M. and S. 10.

*s* Rex v. Nichols, 2 Str. 1227.

\*CHAPTER THE THIRD.

Of Threats, and Threatening Letters.

Threats at  
common  
law.

It is said, that the dispersing of *bills of menace* threatening destruction to the lives or properties of those to whom they were addressed, for the purpose of extorting money, is, at common law, a high misdemeanor, punishable by fine and imprisonment. (a) Threats directed against persons immediately under the protection of a court, are offences punishable by fine and imprisonment; as if a man threaten his adversary for suing him, a counsellor or attorney for being employed against him, a juror for his verdict, or a gaoler or other ministerial officer for keeping him in his custody, and properly executing his duty. (b) And a precedent is given of an indictment at common law against the attorney of a plaintiff in a cause for writing a letter to the attorney of the defendant, who had obtained a verdict on the evidence of his son, threatening to indict the son for perjury unless the defendant gave up the benefit of the verdict. (c)

Rex v.  
Southern-  
ton.  
Threaten-  
ing to  
charge a  
[\*1830]  
party with  
penalties  
for selling  
medicines  
without a  
stamp hol-  
den not to  
be indicta-  
ble.

But where  
the threat  
is calculat-  
ed to over-  
come a firm  
and pru-  
dent man,  
it is indict-  
able.

But it was holden in a modern case, that threatening by letter or otherwise to put in motion a prosecution by a public officer to recover penalties for selling *Friar's Balsam*, without a stamp, (which by the statute 42 Geo. III. c. 56. is prohibited to be vended without a stamped label,) for the purpose of obtaining money to stay the prosecution, was not such a threat, as a firm and prudent man might not be expected to resist; and, therefore, was not in itself an indictable offence at common law; although it was alleged that the money was obtained; no reference being made to any statute which prohibits such attempt. In this case, Lord Ellenborough, C. J. said, "To obtain money under a threat of any kind, or to attempt to do it, is no doubt an immoral action; but to make it indictable, the threat must be of such a nature as is calculated to overcome a firm and prudent man. Now the threat used by the defendant at its utmost extent was no more than that he would charge the party with certain penalties for selling medicines without a stamp. That is no such a threat as a firm and prudent man might not, and ought not, to have resisted. Then what authority is there for considering these as offences at common law? The principal case relied on, is that of *Reg. v. Woodward* and others, which was where the defendants, having another man in their actual custody at the time, threatened to carry him to gaol, upon a charge of perjury; and obtained money from him under that threat, in order

a 1 Hawk. P. C. c. 53. s. 1. Reference is made to 1 Hale 567.—but *qz.* the reference

b 4 Black. Com. 126.

c 2 Chit. Crim. L. 149.

to permit his release. (d) Was not that an actual duress, such as would have avoided a bond given under the same circumstances? But that is very unlike the present case, which is that of a mere threat to put process in a penal action in force against the party. The law distinguishes between threats of actual violence against the person, or such other threats as a man of common firmness cannot stand against, and other sorts of threats. Money obtained in the former cases, under the influence of such threats, may amount to robbery; but not so in cases of threats of other kinds. But this is a case of threatening, and not of deceit: and it must be a threat of such a kind as will sustain an indictment at common law, either according to one case, attended with duress, or, according to others, such as may overcome the ordinary free will of a firm man, and induce him from fear to part with his money. \*The present case is nothing like any of those; it is a mere threat to bring an action, which a man of ordinary firmness might have resisted." (e)

[1831]

It appears that, according to the principles laid down in this case, an indictment will lie, at common law, for extorting money by actual duress or by such threats as common firmness is not capable of resisting. Therefore, where money is extorted from a party by the threat of accusing him of an unnatural crime, and from the circumstances of the case the offence does not amount to robbery, (f) there seems no reason to doubt, but that it is indictable as a misdemeanor at common law. (g)

The sending, or delivering of threatening letters and writings to persons, are at this time made very serious offences by the enactments of several statutes.

Offences by statutes.

The statute 9 Geo. I. c. 22. (Black Act) recites, that ill designing and disorderly persons had associated themselves, &c. and sent letters in fictitious names to several persons, demanding venison and money, and threatening some great violence if such their unlawful demands should be refused, or if they should be interrupted in, or prosecuted for, such their wicked practices; and had actually done great damage to several persons who had either refused to comply with such demands, or had endeavoured to bring them to justice; and then enacts, "that if any person or persons (whether armed or disguised or not,) shall knowingly send any letter without any name subscribed thereto, or signed with a fictitious name, demanding money, venison, or other valuable thing; or shall forcibly rescue any person being lawfully in custody of any officer or other person for any such offence; or if any person or \*persons shall by gift or promise of money or other reward procure any of his majesty's subjects to join him or

9 Geo. I. c. 22. Persons knowingly sending any letter without any name, or with a fictitious name, demanding money, &c. or forcibly rescuing, &c. guilty of felony, without mercy

[1832]

d 11 Mod. 137, more fully stated in 8 East. 133, 134.

e Rex v. Southerton, 6 East. 126, 140

And see ante, 232

f Int. 1019, et sequ.

g See a precedent in 301 i. l. 11 m. l. 841



Offenders  
not surren-  
dering.

And per-  
sons con-  
cealing,  
&c. such  
offenders,  
guilty of  
felony,  
without  
clergy.

27 Geo. II.  
c. 15.

Persons  
knowingly  
sending  
any letter  
without  
any name,  
or with a  
fictitious  
name, &c.  
threaten-  
ing to kill,  
or to burn  
houses, &c.  
though  
nothing be  
demanded,  
or forcibly  
rescuing,  
&c. guilty  
of felony,  
without  
clergy.

[\*1833]

30 Geo. II.  
c. 24. s. 1.

Persons  
knowingly  
sending or  
delivering  
any letter  
or writing,  
with or  
without a  
name, &c.  
threaten-  
ing to ac-  
cuse any  
person of  
any crime,  
&c. with  
the view to  
extort mo-  
ney, goods,  
&c. may be

them in any such unlawful act; every person so offending, being thereof lawfully convicted, shall be adjudged guilty of felony without benefit of clergy." The fourth section enacts that such offenders not surrendering themselves when demanded by the king's proclamation, and making full confession of their accomplices, shall be guilty of felony without benefit of clergy. And (by s. 5.) persons who after the time for such surrender expired shall conceal, aid, abet, or succour any such offender, knowing him to have been so charged, and to have been required to surrender by such order, shall, on conviction, be guilty of felony, without benefit of clergy. By s. 14. such offences may be tried in any county of England.

The statute 27 Geo. II. c. 15. recites the 9 Geo. I. c. 22.; and recites also that divers letters had been sent to several of his majesty's subjects, threatening their lives, or burning their houses, which letters not demanding money, venison, or any valuable effects, were not subject to the penalties of the said act, and then enacts, "that if any person or persons shall knowingly send any letter without any name subscribed thereto, or signed with a fictitious name or names, letter or letters, threatening to kill or murder any of his majesty's subject or subjects, or to burn their houses, outhouses, barns, stacks of corn or grain, hay or straw, though no money or venison, or other valuable thing shall be demanded in or by such letter or letters; or shall forcibly rescue any person being lawfully in custody of any officer or other person for the said offence, every person so offending, being thereof lawfully convicted, shall be adjudged guilty of felony, and shall suffer death as in cases of felony without benefit of clergy."

The statute 30 Geo. II. c. 24. s. 1. enacts, that "all persons \*who shall knowingly send or deliver any letter or writing, with or without a name or names subscribed thereto, or signed with a fictitious name or names, letter or letters, threatening to accuse any person of any crime punishable by law with death, transportation, pillory, or any other infamous punishment, with a view or intent to extort or gain money, goods, wares, or merchandizes from the person or persons so threatened to be accused, shall be deemed offenders against law and the public peace; and the court before whom such offender or offenders shall be tried, shall in case he, she, or they shall be convicted of any of the said offences, order such offender or offenders to be fined and imprisoned, or to be put in the pillory, (i) or publicly whipped, or to be transported, as soon as conveniently may be (according to the laws made for transportation of felons) to some of his majesty's colonies or plantations in America, for the term of seven years, as the

<sup>h</sup> This statute was made perpetual by 51 Geo. II. c. 42.

<sup>i</sup> The punishment of the pillory for such

offence is now taken away by the 56 Geo. III. c. 138.—See *ante*. 211. note (n).

court in which any such offender or offenders shall be convicted shall think fit and order."

The statute 52 Geo. III. c. 64. s. 1. enacts that "all persons who shall knowingly send or deliver any letter or writing with or without a name or names subscribed thereto, or signed with a fictitious name or names, letter or letters, threatening to accuse any person of any crime punishable by law with death, transportation, pillory, or any other infamous punishment, with a view or intent to extort or gain any bond, bill of exchange, bank-note, promissory note, or other security for the payment of money, or any warrant or order for the payment of money, or delivery or transfer of goods or other valuable thing, shall be deemed offenders against law and the public peace, and shall be liable to be prosecuted and punished in like manner as if they had sent or delivered such letter or writing with a view or intent to extort money, \*goods, wares, or merchandizes from the person or persons so threatened."

There are other statutes also which relate to the offences of writing or sending threatening letters or messages to master manufacturers in certain trades therein mentioned.

The statute 12 Geo. I. c. 34. s. 6. enacts that "if any person or persons shall write or cause to be written, or knowingly send or cause to be sent, any letter or other writing or message, threatening any hurt or harm to any such master woolcomber or master weaver, or other person concerned in the woollen manufacture, or threatening to burn, pull down or destroy any of their houses, or out-houses, or to cut down or destroy any of their trees, or to maim or kill any of their cattle, for not complying with any demands, claims or pretences of any of his or their workmen, or others employed by them in the said manufacture, or for not conforming or not submitting to any such illegal bye laws, ordinances, rules or orders as aforesaid; every person so knowingly and wilfully offending in the premises, being thereof lawfully convicted upon any indictment, to be found within twelve calendar months next after any such offence committed, shall be adjudged guilty of felony, and shall be transported for seven years to some or one of his majesty's colonies or plantations in America, by such ways, means, and methods, and in such manner and under such pains and penalties, as felons in other cases are by law to be transported."

The statute 22 Geo. II. c. 27. s. 12. recites the foregoing sixth section as well as many other clauses of the 12 Geo. I. c. 34. and recites also that it was necessary that the said several provisions and regulations in the said last in part recited act should be extended to journeymen dyers, journeymen hot-pressers, and all other persons employed in the woollen manufactures of this kingdom, and also to \*journeymen servants, workmen and labourers, employed in the making of felts or hats, and in the manufactures of silk,

fined and imprisoned, &c.

52 G. III. c. 64. Persons knowingly sending or delivering any letter or writing, with or without a name, threatening to accuse any person of any crime, &c.

[\*1834]

Statutes relating to threatening letters, &c.

12 Geo. I. c. 34. s. 6. Persons writing, &c. or sending any letter or message, threatening harm, &c. to master woolcombers, &c. or to injure their property for not complying with any demands, &c. of their workmen, &c.

22 Geo. II. c. 27. s. 12. extends the 12 Geo. I. c. 34. s. 6. to journeymen, &c. employed in various other manufactures. [\*1835]

mohair, fur, hemp, flax, linen, cotton, fustian, iron and leather, or any manufactures made up of wool, fur, hemp, flax, cotton, mohair or silk, or of any of the said materials mixed one with another; and then enacts "that the said several before recited clauses in the said act, made in the twelfth year of his said late majesty's reign, and all the provisions, regulations, pains, penalties and forfeitures therein contained, shall extend and be construed, deemed and adjudged to extend to journeymen dyers, journeymen hot-pressers, and all other persons whatsoever, employed in or about any of the woollen manufactures of this kingdom, and also to journeymen, servants, workmen, and labourers, and all other persons whatsoever employed in the making of felts or hats, or in or about any of the manufactures of silk, mohair, fur, hemp, flax, linen, cotton, fustian, iron or leather, or in or about any manufactures, made up of wool, fur, hemp, flax, cotton, mohair, or silk, or of any of the said materials mixed one with another, in as full and ample manner as the said provisions, regulations, pains, penalties, and forfeitures are by the said last mentioned act declared to extend to the several and respective persons therein named; and the pains, penalties and forfeitures, which shall be incurred by reason of any offence committed against the said last mentioned act, by any person or persons employed or concerned in or about any of the said manufactures hereinbefore enumerated, shall be inflicted, levied and recovered, in the same manner as the pains, penalties and forfeitures contained in the said last in part recited act, are directed to be inflicted, levied and recovered, upon and against the several and respective persons therein mentioned."

Construction of the statutes.

9 Geo. I. c. 22. not repealed by 30 Geo. II. c. 24. [\*1836]

Several points relating to the construction of these statutes require to be noticed.

\*It has been holden, that the 9 Geo. I. c. 22. was not repealed by the 30 Geo. II. c. 24. In the case in which the point was raised, it was attempted to support the argument of the first statute being so repealed, by the admitted doctrine, that if one act of parliament make a particular case a capital offence, and a subsequent act make the *same case* only a misdemeanor, the last act is a repeal of the former. (k) But the Judges denied that the offence in the statute 30 Geo. II. c. 24. was *the same* as that contained in the 9 Geo. I. c. 22.; for they said that the statute 9 Geo. I. extends to such cases only in which there is an *actual demand*; whereas the statute 30 Geo. II. reaches cases which fall short of a demand, and includes letters sent *with a view or intent* to extort money, though no demand be made. And they held that the doctrine contended for does not apply where two statutes are consistent.

k See Davis's case. *ante*. 1185.

court in which any such offender or offenders shall be convicted shall think fit and order."

The statute 52 Geo. III. c. 64. s. 1. enacts that "all persons who shall knowingly send or deliver any letter or writing with or without a name or names subscribed thereto, or signed with a fictitious name or names, letter or letters, threatening to accuse any person of any crime punishable by law with death, transportation, pillory, or any other infamous punishment, with a view or intent to extort or gain any bond, bill of exchange, bank-note, promissory note, or other security for the payment of money, or any warrant or order for the payment of money, or delivery or transfer of goods or other valuable thing, shall be deemed offenders against law and the public peace, and shall be liable to be prosecuted and punished in like manner as if they had sent or delivered such letter or writing with a view or intent to extort money, \*goods, wares, or merchandizes from the person or persons so threatened."

There are other statutes also which relate to the offences of writing or sending threatening letters or messages to master manufacturers in certain trades therein mentioned.

The statute 12 Geo. I. c. 34. s. 6. enacts that "if any person or persons shall write or cause to be written, or knowingly send or cause to be sent, any letter or other writing or message, threatening any hurt or harm to any such master woolcomber or master weaver, or other person concerned in the woollen manufacture, or threatening to burn, pull down or destroy any of their houses, or out-houses, or to cut down or destroy any of their trees, or to maim or kill any of their cattle, for not complying with any demands, claims or pretences of any of his or their workmen, or others employed by them in the said manufacture, or for not conforming or not submitting to any such illegal bye laws, ordinances, rules or orders as aforesaid; every person so knowingly and wilfully offending in the premises, being thereof lawfully convicted upon any indictment, to be found within twelve calendar months next after any such offence committed, shall be adjudged guilty of felony, and shall be transported for seven years to some or one of his majesty's colonies or plantations in America, by such ways, means, and methods, and in such manner and under such pains and penalties, as felons in other cases are by law to be transported."

The statute 22 Geo. II. c. 27. s. 12. recites the foregoing sixth section as well as many other clauses of the 12 Geo. I. c. 34. and recites also that it was necessary that the said several provisions and regulations in the said last in part recited act should be extended to journeymen dyers, journeymen hot-pressers, and all other persons employed in the woollen manufactures of this kingdom, and also to \*journeymen servants, workmen and labourers, employed in the making of felts or hats, and in the manufactures of silk,

fine and imprisonment, &c.

52 Geo. III. c. 64. Persons knowingly sending or delivering any letter or writing, with or without a name, threatening to accuse any person of any crime, &c.

[\*1834]

Statutes relating to threatening letters, &c.

12 Geo. I. c. 34. s. 6. Persons writing, &c. or sending any letter or message, threatening harm, &c. to master woolcombers, &c. or to injure their property for not complying with any demands, &c. of their workmen, &c.

22 Geo. II. c. 27. s. 12. extends the 12 Geo. I. c. 34. s. 6. to journeymen, &c. employed in various [\*1835] other manufactures

principle of honour has superseded them all. The subject on which I have addressed you has long lain dormant; and it was because I \*thought the attack of a most serious complexion, that I hesitated for such a length of time in giving any countenance to it. Not that I ever sought for any circumstance to influence my judgment, or qualify my opinion; and for all that has ever come to my knowledge, it may be all the *moonshine of the moment*; I am, therefore, so far candid, and, I trust, not indelicate; and it will at least be a satisfaction to you, to be told, with a solemnity becoming the character I have professed myself, that not a soul, but myself, is in possession of a line of the MS., nor has it ever been out of my hands, or perused or heard by any person living, since first I had it; so that when it is committed to the flames, *all* will necessarily die with it. Of this you shall have a testimony so clear and unequivocal, that it will not be possible for you afterwards to doubt. Thus much I have suggested for your satisfaction. You will now give me leave to say something on behalf of *the cause* I have engaged in. I have not the least objection to an interview, and I readily close with your proposition; but there are a few preliminaries which I must first beg leave to adjust. Perhaps I may be more anxious to urge them, in order to have some proof of your sincerity; after which I am at your service. In order to relieve a destitute and unhappy family, struggling with sickness and sorrow, you will permit me to be your almoner. Will you enable me to dispose of a little of your money, as I shall see occasion? It is a duty I owe to the cause of humanity to urge it. Remember, sir, I am now only making my appeal to your *benevolence*. I am holding out no delusions to exact the involuntary tribute. I am asking you, as a gentleman, as a man, to give me some earnest of your intention to prove what I am so strongly inclined to give you credit for. Inclose a bank-note in a letter addressed to R. R. and let it be left at the Cambridge coffee-house, the top of Newman-street, in Goodge-street, on the side of the bar. At the entrance of the coffee-room is a bracket for letters: let it be placed there between the hours of eleven and one, on Thursday next; and at five o'clock, on the same day, a line shall be sent by a porter, to your house to

[\*1839] \*acknowledge the receipt; after which, if you will name any day (Friday excepted) in the following week, on which it will suit you, in the evening, to take a bottle of wine at the King's-head-tavern, in Middle-row, Holborn, or elsewhere, I will, with pleasure, attend you. Our meeting, however, is to be private; and *tête à tête*. Thus, possibly, over the ashes of the MS. a phoenix may arise, that may prove the forerunner to friendship. I shall send to the coffee-house between the hours of one and four; and I will venture to say, that you will have no reason to be dissatisfied with the event of this correspon-



dence. To obtain confidence, it is necessary, or, at least reasonable, to expect that one should be reposed. I have the honour to remain,

Sir,  
Your obedient, humble servant,  
R. R.

“Tuesday, 12th January, 1796.

J. O. Oldham, Esq.

Brook-street,  
(*Private*) Holborn.”

It appeared, upon the evidence, that the prosecutor had served an apprenticeship with a person named Dolly, by whom he was afterwards taken into partnership; that upon Dolly's death, which happened a few years afterwards, a report was spread that the prosecutor had been the author of his death, upon which he brought an action against two persons, and had judgment against them; that, before the letter in question was sent, several other letters had been written, by the prisoner, to the prosecutor, to which he returned answers, for the purpose of obtaining information of the prisoner's place of abode in order to bring him to justice. And all these letters were read in evidence, as serving to explain the letter upon which the prisoner was indicted. It was intimated in them that another person who was a friend of the prisoner's, and who was in distress, had put certain MSS. into his hands, containing a charge of the prosecutor's having murdered his former master, Dolly, \*and afterwards married the widow, his accomplice; but that the prisoner was unwilling to publish the MS. containing so serious a charge, without giving a previous intimation to the prosecutor, and hearing what he had to propose upon the subject. A subsequent correspondence between the prosecutor and the prisoner was also given in evidence; in the course of which the prisoner communicated a few pages of the supposed MS., in verse, from which the charge alluded to was to be plainly inferred. Upon this evidence the learned Judge, before whom the prisoner was tried, left the case to the jury to say whether the prisoner sent the letter, above set forth, and whether it contained a threat to publish a libel on the prosecutor, imputing to him the death of Dolly, unless he would send the prisoner a bank note; and, in case they were of that opinion, they were directed to find the prisoner guilty. The jury found him guilty; and also found specially, that the prisoner sent the letter in the indictment, and that it contained a threat to publish a libel, imputing to the prosecutor the murder of his master, in order to extort money from him.

Several objections were taken to this conviction: and amongst others it was objected that the letter did not contain *a threat or demand*, so as to bring the case within the statute 9 Geo. I. c. 22. But the twelve Judges, after hearing the point



[\*1841]

argued, all agreed in overruling the objection. Buller, J., in delivering their opinion, after adverting to the preamble of the statute, (*n*) upon which the counsel for \*the prisoner had founded his argument, by contending that it necessarily so far restrained the enacting clause that the demand contained in a letter must be direct and peremptory and accompanied with a threat of bodily harm, said :—"Where the enacting clause of a statute refers to such offences only as are contained in the preamble, it may be restrained by the preamble: but in this case it would be doing violence to very plain words, and repealing some of the obvious provisions of the statute, if it were so restrained. It is no uncommon thing for the preamble of a statute to recite a particular mischief, as the cause of making it, and yet for the enacting part to embrace more general objects, and to extend to other cases which the legislature thought within the mischief. If the enacting clause in this case were to be restrained by the preamble, the statute would apply only to cases where several persons had joined together in confederacy; where the letter was signed with a fictitious name only; and where venison or money was demanded; and not to a letter without a name, nor to a demand of any other valuable thing than money or venison, nor to any demands by such letters, whether accompanied with a threat of bodily harm or not. But the enacting clause expressly applies to a single offender; to a letter sent without a name, as well as to one signed with a fictitious name; and to a demand of any valuable thing as well as of money or venison; and also to

[\*1842]

\*all demands by such letters, whether accompanied with a threat of bodily harm or not. I agree that a mere request, such as asking charity, without imposing any conditions, would not come within the sense or meaning of the word '*demand*,' but here the demand was made under a threat that if it was not complied with, the prisoner would publish a libel against the prosecutor, imputing to him the death of his master: for this is the construction which the jury by their verdict have expressly put upon the letter. Now, whether the letter does amount to such a demand or not, is a question for the Judges to determine, upon reading it as it is stated in the record; and

*n* The preamble of the statute is, "Whereas several ill-designing and disorderly persons have of late associated themselves under the name of *Blacks*, and entered into confederacies to support and assist one another in stealing and destroying of deer, robbing of warrens and fish-ponds, cutting down plantations and trees, and other illegal practices, and have, in great numbers, armed with swords, fire-arms, and other offensive weapons, several of them with their faces blacked, or in disguised habits, unlawfully hunted in forests belonging to his majesty, and in the parks of divers of his majesty's subjects, and destroyed, killed, and carried away the deer, robbed

warrens, rivers, and fish-ponds, and cut down plantations of trees, and have likewise solicited several of his majesty's subjects, with promises of money, or other rewards, to join with them, and have sent letters in fictitious names, to several persons, demanding venison and money, and threatening some great violence, if such, their unlawful demands, should be refused, or if they should be interrupted in, or prosecuted for, such their wicked practices, and have actually done great damage to several persons, who have either refused to comply with such demands, or have endeavoured to bring them to justice, to the great terror of his majesty's peaceable subjects."

they are all clearly of opinion that this is *a demand* within the true intent and meaning of this statute. It is a demand of money or money's worth, (which a bank-note is) by holding out a threat to impute murder to the prosecutor, and to injure his fame and his character; and not a request of voluntary charity." (o)

In the following case, upon the statute 27 Geo. II. c. 15., it was holden that the construction of the letter, namely, the question whether it contained, in the terms of it, an actual threatening to kill and murder, was properly left to the jury. The first count of the indictment charged the prisoner generally with feloniously sending to the prosecutor a certain letter in writing, with the fictitious letters J. W. thereunto subscribed, threatening to kill and murder the prosecutor. (p) In the second count the letter was set out in the following form :

Girdwood's case. Question left to the jury, whether a letter contained an actual threatening to kill and murder.

" Sir,

February 9, 1776.

" I am sorry to find a gentleman like you would be guilty of taking *Mac Allester's* life away for the sake of two or three guineas; but it will not be forgot by one who is just \*come home, to revenge his cause. This you may depend upon, whenever I meet you, I will lay my life for him in this cause. I follow the road, though I have been out of London; but on receiving a letter from *Mac Allester*, before he died, for to seek revenge, I am come to town. I remain a true friend to *Mac Allester*."

[\*1843]

" J. W."

The learned Judge, before whom the prisoner was tried, left it to the jury to consider whether this letter contained in the terms of it an actual threatening to kill and murder; directing them to acquit the prisoner if they thought that the words might import any thing less than to kill or murder. The jury found the prisoner guilty; but judgment was respited to take the opinion of the twelve Judges upon this point, (amongst others) viz. whether the letter purported to be a letter threatening to kill or murder? And ten Judges, who were present at the conference, were all clearly of opinion that the conviction was right; and that the construction of the letter was properly left to the jury. (q)

It was holden, however, in a subsequent case, by the majority of the Judges, that as the letter in question did not, by necessary construction, import a threat to burn the prosecutor's farm-house and buildings, a conviction upon the statute 27 Geo. II. c. 15. was wrong. The letter was as follows :—

Jepson and Springett's case. Holden that as the letter did not, by

o Robinson's case, 1796, 2 Leach 749. 2 East. P. C. c. 23. s. 2. p. 1110.

p See post. 1851, as to the necessity of setting out the letter in the indictment.

q Girdwood's case cor. Hotham B. O. B. 1776, and East. T. 1776, 1 Leach 142. 2 East. P. C. c. 23. s. 4. p. 1121. The prisoner was executed.

necessary  
construc-  
tion, im-  
port a  
threat to  
[\*1844]  
burn, &c.  
a convic-  
tion upon  
the 27 Geo.  
II. c. 15.  
was wrong.

Mr. Woodgate, Sir,

March 3d, 1798.

I am very sorry to acquaint you that we are determined to set your mill on fire, and likewise to do all the public injury that we are able to do you, in all your *farms and seteres*, (r) which you are in possession of, without you on \*next, s; day release that Ann Wood which you put in confinement. Sir, We mention in a few lines, that we hope if you have any regard for your wife and family, you will take our meaning without any thing further, and if you do not we will persist as far as we possibly can, so you may lay your hand at your heart and strive your uttermost ruin. I shall not mention nothing more to you, until such time as you find the few lines a fact, with our respect. So no more at this time from me,

R. R.

Upon the trial, Mr. Woodgate, the prosecutor, swore, that he had had a share in a mill three years before this letter was written, but had no mill at that time; but that he held a farm when the letter was written and came to his hands, and still held it, with several buildings upon it. It was objected that this was not such a letter as comprehended the offence in the act of parliament; and the prisoner having been convicted, the point was submitted to the consideration of the Judges, who agreed (except Eyre, C. J., who was absent) that as the prosecutor had no such property at the time as the mill which was threatened to be burnt, that part of the letter must be laid out of the question. As to the rest of the letter, Lord Kenyon, C. J., and Buller, J. were of opinion that it must be understood as also importing a threat to burn the prosecutor's farm-house and buildings: but the other Judges not thinking that a necessary construction, the conviction was holden wrong, and a pardon recommended. (t)

A letter  
signed with  
[\*1845]  
initials  
only, is a  
letter with-  
out a name  
within 9  
Geo. I. c. 22.

It has been holden that the sending a letter signed with initials only, is a sending a letter *without a name*, within the \*statute 9 Geo. I. c. 22. Buller J., in delivering the opinion of the Judges on this point, said, "Whether the letter be with or without a name, is a simple fact appearing on the face of the letter itself. It is signed with two letters, R. R., which are so far from being a name, that no man, on looking at the letter only, can tell whether it meant to refer to any name, or what that name was." (u)

But a case  
will not be  
within the

But the fact of no name being subscribed to the letter, will not bring the case within either the statute 9 Geo. I. c. 22., or the 27 Geo. II. c. 15., if from circumstances, and

r It is said that by this was understood "settings or lettings;" and that the whole letter was evidently the production of an illiterate person, being falsely spelt nearly throughout. 2 East. P. C. c. 23. s. 2. p. 1115, note (a).

s In 2 East. *ibid.* the learned writer says, that the word at this part was unintelligible

in his copy.

t Jepson and Springett, (case of,) cor. Lord Kenyon, C. J., *Essex Sum. Ass.* 1798, and considered of by the Judges in *Mich. Ter.* 1798. 2 East. P. C. c. 23. s. 2. p. 1115.

u Robinson's case, 2 Leach 749. 2 East. P. C. c. 23. s. 2. p. 1110. *Ante.* 1842.

the contents of the letter itself, it appears that the writer had no intention of concealing himself, but on the contrary made himself known in the letter. The letter upon which this point was raised was in the following words: "Mr. James, before I put my intentions in force, I thought it proper to acquaint you with the same. I am determined you shall die with a leaden fever if you dont pay the money you have taken out of the court of King's Bench; as I can't rest to think of the usage I received from you: it is worse than murder." It appeared by the evidence that the prosecutor, William James, who was an attorney at Henley, had formerly been employed in his profession as an attorney by the prisoner's deceased mother, in her lifetime; that, in the course of such employment, he had received a sum of money out of King's Bench; and that the prisoner, who had been reduced to great poverty, had conceived an opinion that the prosecutor had wronged him, by not accounting for it. And it appeared that, for several years last past, the prisoner had very frequently demanded the money, both when intoxicated and when sober; and had abused the prosecutor very much for refusing to pay it; threatening to set fire to his house, and using other menaces. And further, that the prosecutor had frequently corresponded with him, and was well acquainted \*with his hand-writing; and that the letter in question was written in his usual manner, without any disguise of the character. The jury found the prisoner guilty; but the learned Judge before whom he was tried respited the sentence, in order to take the opinion of the Judges, whether, as the transactions previous to the sending of the letter, the hand-writing, and the contents of the letter itself, shewed clearly who was the writer, and that he could have no intention to conceal himself; the case came within the meaning of either the 9 Geo. I. c. 22., or the 27 Geo. II. c. 15., no name being subscribed to the letter. All the Judges who assembled to consider the case, held that the conviction was wrong; for, as the prisoner made himself known in the letter, it was the same thing as if he had signed his name to it; and, therefore, such a letter was not within the true spirit of the act, and the prisoner was accordingly recommended for a pardon. (x)

It is observed, that it is evident, from the whole scope of the acts of the 9 Geo. I. c. 22., and 27 Geo. II. c. 15., making the offences therein described felony; that they were levelled against such whose intention it was, (by writing such letters, either without names or in fictitious names,) to conceal themselves from the knowledge of the party threatened, that they might obtain their object by creating terror in his mind, without incurring danger and responsibility them-

statutes 9 Geo. I. c. 22., or 27 Geo. II. c. 15., if the writer makes himself known in the letter, though he does not subscribe any name. Heming's case.

[\*1846]

Difference between 9 Geo. I. c. 22. 27 Geo. II. c. 15., and 30 Geo. II. c. 24., as to the signature of a name to the letter.

x Heming's case, cor. Chambre, J., *Warwick Sum. Ass.* 1790; considered of by the

Judges in *Mich. T.* 1799. 2 East. P. C. c. 23. s. 2. p. 1116.

selves : and that, in this respect the subsequent act of the 30 Geo. II. c. 24. which only makes the offence a misdemeanor, though punishable with transportation, is very differently worded from the other two, for it extends to any letter, “with or without a *name*,” &c. or signed with a *fictitious name*, &c.; and, therefore, may well include letters, (in other respects within the scope of it,) though signed in the writer’s real name. (*y*)

[\*1847]

A bank-note holden to be a *valuable thing* within the 9 Geo. I. c. 22.

\*A point was at one time made upon the 9 Geo. I. c. 22. that a *bank-note* was not a “*valuable thing*,” within the words of that statute; on the ground that, though it was a *valuable thing* at the time when the demand was made, yet it was not so at the time the statute was passed, because it was not then the subject of larceny. But the Judges were of opinion that it was sufficient if the thing demanded were *valuable* at the time that the demand was made, though it did not exist, or the value of it was not known at the time of the passing of the statute. (*z*)

A charge of an intent to extort *money*, not supported by proof of an intent to extort a bill of exchange.

In a case where the indictment, which was framed upon the statute 30 Geo. II. c. 24., charged the prisoner with sending a threatening letter, intending “to extort and gain *money*,” it was holden not to be supported by evidence of a letter threatening to accuse the prosecutor of an unnatural crime if he did not give up a certain *bill* drawn by the prisoner, and of which the prosecutor was the holder. (*a*) This case was previous to the statute 52 Geo. III. c. 64. (*b*)

Of the sending or delivering the letter.

In some cases the question as to what will amount to a *sending* of a threatening letter by the party charged has come under consideration. It should be observed, that the statutes 9 Geo. I. c. 22., and 27 Geo. II. c. 15., relate to such persons as shall “*knowingly send*” any letter, &c. whereas the statutes 30 Geo. II. c. 24., and 52 Geo. III. c. 64., extend to persons who shall “*knowingly send or deliver*” any letter, &c. And the statutes 12 Geo. I. c. 34., and 22 Geo. II. c. 27., (which relate to threats, &c. to master-manufacturers,) extend to persons who “shall *write or cause to be written or knowingly send or cause to be sent any letter, &c.*”

[\*1848]

Hammond’s case. Letter written by the wife, and delivered to the prosecutor by

\*In the following case the two prisoners, John Hammond, and Mary Hammond, were indicted on the statutes 9 Geo. I. c. 22., and 27 Geo. II. c. 15., for sending a threatening letter to the prosecutor, demanding 10*l.*: one set of counts in the indictment charging that the prisoners sent and delivered the said letter, and another set charging that they caused it to be sent and delivered. Upon the evidence, it appeared that the prisoners were husband and wife, and

*y* 2 East. P. C. c. 23. s. 3. p. 1117.

*z* Robinson’s case, 2 Leach 749. 2 East. P. C. c. 23. s. 2. p. 1110. *Ante*, 1842.

*a* Major’s case, O. B., 1796, and Mich. T.

1796. 2 Leach 772. 2 East. P. C. c. 23. s. 3. p. 1118.

*b* *Ante*, 1833.



lived as servants with the prosecutor; that the wife had written the letter in question, and that it was delivered to the prosecutor by the husband, who said he found it in the prosecutor's garden. But there was no evidence that the husband had any knowledge of its contents. It was submitted to the court, on behalf of the prisoners, that the evidence only proved that the wife had written the letter, and that the husband had delivered it; and that there was no proof of its having been sent to the prosecutor. The court observed that, in cases so highly penal, it was necessary not only to consider the intention of the legislature, but to bring the offender within the words of the statute: and they said that the mere act of *writing* a threatening letter would not constitute the offence; for, unless the writer or contriver of such a letter afterwards sent it to the party whose fears it was calculated to alarm, it could not produce the mischief which the legislature intended alone to suppress: and that it was impossible to conceive that *carrying* a letter could, by any construction, be comprehended under the words "*send any letter*" which were the precise terms used in the statutes. They further said that, at the time the statutes in question passed, it seemed that the legislature never had it in contemplation that any person would be the carrier of a threatening letter which he himself had written or contrived; but conceived that such a letter would be sent by the post, or by some secret conveyance, so as to prevent the discovery of the person by whom it was sent. That it was clear, therefore, that the act of delivering a threatening letter was not the offence described in the statutes of 9 Geo. I. c. 22., \*and 27 Geo. II. c. 15.; though, if any doubt could be entertained upon the point, the legislature itself had removed it, as, by the subsequent act of the 30 Geo. II. c. 24., the offence of *delivering*, as well as *sending*, a threatening letter, was made a misdemeanor, punishable in the discretion of the court, according to the circumstances of the case; which statute shewed, that the legislature did not contemplate making the *delivery* of a threatening letter felony, when the statutes on which the present indictment was founded were passed. The court then observed, that there was still a question in this case for the consideration of the jury; for though the woman were the wife of the other prisoner, yet, if the jury were of opinion that she wrote the letter herself, without any interference of her husband, and sent it by him, without his knowing any thing of the contents, to the prosecutor, she alone might be found guilty; but, otherwise, both the prisoners must be acquitted. The jury, upon this direction, acquitted both the prisoners. (c)

the husband, holden that the act of *delivering* a threatening letter is not within the 9 Geo. I. c. 22., or the 27 Geo. II. c. 15. But the case was left to the jury to say, whether the wife wrote the letter without the interference of the husband, and sent it by him without his knowing the contents.

[\*1849]

c Hammond's case, (John and Mary,) *cor.* Leach 444. 2 East. P. C. c. 23. s. 4. p. 1119. Ashhurst, J., and Perryn, B. O. B.. 1787. 1



Sending a letter, knowing the contents.

[\*1850]

Sending the letter by the post, or by indirect means.

[\*1851]

In a case where the question arose whether there was sufficient evidence of the prisoner's having sent the letter in question, knowing its contents, the facts were that the prosecutor proved the receipt of the letter, by the penny-post, at his house, in a street near Berkeley-square, in the county of *Middlesex*; and his tracing it up to one Elizabeth Robinson, who swore that she was employed in going errands for the prisoners in Newgate; and that having received this letter from the prisoner's hands at the grate at Newgate, she immediately carried it to the post-office in Newgate-street. And the servant of the office keeper confirmed her account; and both swore to the identity of the letter, the direction being in a remarkable hand. The case was left to the jury with a direction to consider whether from the prisoner's delivering the letter he knew the contents of it; and the jury, having found the prisoner guilty, the \*question was submitted to the consideration of the Judges; whether there were sufficient evidence to be left to the jury of the prisoner's sending the letter, knowing the contents? The Judges held that the conviction was right. (*d*)

In a case where the prisoners were indicted for sending a letter, the proof was that the letter was of the handwriting of one of the prisoners, and that it was thrown by the other prisoner into the yard of the prosecutor, from whence it was taken by a servant of the prosecutor, and delivered to him. (*e*) And in another case the proof was that the letter in question was in the handwriting of the prisoner who sent it to the post-office from whence it was sent in the usual manner to the prosecutor. (*f*) In another case where it was proved that the prisoner dropped the letter into a vestry-room, which the prosecutor frequented every Sunday morning, before service began, from whence the sexton had picked it up, and delivered it to him, the learned Judge said that it seemed to be very immaterial whether the letter were sent directly to the prosecutor, or were put into a more oblique course of conveyance, by which it might finally come to his hands. (*g*) It, therefore, seems to be sufficient to \*state in the indictment that the pri-

*d* Girdwood's case, O. B. 1776, Easter T. 1776. 1 Leach 142. 2 East. P. C. c. 23. s. 4. p. 1120. *Ante*, 1842.

*e* Jepson and Springett (case of) *cor.* Lord Kenyon, C. J., *Easter* Sum. Ass. 1798, and Michaelmas T. 1798. 2 East. P. C. c. 23. s. 2. p. 1115. *Ante*, 1843.

*f* Heming's case, *cor.* Chambre, J., *Harwick* Sum. Ass. 1799. 2 East. P. C. c. 23. s. 2. p. 1116. *Ante*, 1845.

*g* Lloyd's case, *cor.* Yates, J., *Hereford* Spr. Ass. 1767. 2 East. P. C. c. 23. s. 5. p. 1123. The case was submitted to the consideration of the Judges on another point in which the indictment was holden to be defective

(see *post*. 1851.) so that it became unnecessary for them to give any opinion on the

point above stated. In 2 East. P. C. *ib. sup.* the learned writer in note (*a*) says, "Qu. whether if one intentionally put a letter in a place where it is likely to be seen and read by the party for whom it is intended, or to be found by some other person, who it is expected will forward it to such party, and the letter do accordingly reach its intended destination, this may not be said to be a sending to such party, supposing such an allegation to be necessary upon the true construction of the acts? The same sort of evidence was given in Springett's case, (*ante*, 1843.) in support of the allegation of sending a threatening letter to the prosecutor, and no objection was made on that ground. And the general current of precedents is in the same form."

soner sent the letter (therein set forth) directed to the prosecutor without expressly alleging that he sent it to the prosecutor. (h)

It has been decided, upon reference to the Judges, that the indictment must set forth the threatening letter; in order that the court may judge whether it falls within the purview of the respective statutes. It was contended, in support of the indictment, upon which the point was raised, that it pursued the words of the statute 9 Geo. I. c. 22.; that the defendant was charged with sending the letter "feloniously and contrary to the form of the statute;" and that those words imported that the letter was of such a nature as the statute had in view. But the Judges were of opinion that the indictment was bad in not setting forth the letter itself; and that if the words "feloniously and contrary to the form of the statute," were allowed to supply the place of the letter, it would be leaving it to the prosecutor to put his own interpretation upon it, and to the jury the construction of the matter of law. (i)

The indictment must set forth the letter.

It is also necessary that the indictment should allege an intent of the writer in sending the letter consistent with and deducible from the letter itself. We have seen that in a case where the indictment charged that the letter was sent to extort money, and it appeared upon the face of the letter that it was sent with the view of inducing the prosecutor to give up a bill of exchange, the Judges held that the allegation was not sustained. (k)

And the intent of the writer should be alleged correctly.

\*The statute 9 Geo. I. c. 22. provides that offences against that act may be tried in any county of England; but no such provision being made with respect to offences within the other statutes, the trial of such offences must be governed by the general rule. Upon this rule there is no doubt but that the trial may be in the county in which the prosecutor received the letter by the post, though delivered by the prisoner and put into the post in another county. (l) And it seems that the prisoner may be tried in the county in which he sends the letter, though the prosecutor may receive it in another county. For as the offence described in the statutes is that of *sending* the threatening letter, it should seem that it is complete, as far as depends on the prisoner, by his putting the letter into

[\*1852] Place where offence may be tried.

h *Id. Ibid.*

i Lloyd's case, *ante*, note (g). And the law of this case was recognized by Grose, J., in delivering the opinion of the twelve Judges in Hunter's case, 2 Leach 631.

k Major's case, *ante*, 1847.

l Girdwood's case, 1 Leach 142. 2 East. P. C. c. 23. s. 4. p. 1120, *ante*, 1842, where the letter was *received* by the prosecutor in Middlesex, and the trial had in that county, though the letter was delivered by the prisoner to a woman in London, and by her put into

the office which was also in London. Esser's case, 2 East. P. C. c. 23. s. 7/p. 1125. where the offence was laid in Middlesex, though the letter was dated from Maidstone, in Kent, and sent by the post from Maidstone; and Lord Mansfield held that as the letter was directed to the prosecutor in Middlesex, where it was delivered, that was a sending in Middlesex, and that the whole was to be considered as the act of the defendant to the time of the delivery in that county.

the post-office to go into another county : and that by his act of putting the letter into the post-office in the county of A., he sends it (in the language of the statutes) to the prosecutor, though the latter may afterwards receive it in the county of B. (m)

Prior and subsequent letters may be given in evidence.

From a case which was cited in a former part of this Chapter, it appears that prior and subsequent letters, from the prisoner to the party threatened, may be given in evidence as explanatory of the meaning and intent of the particular letter on which the indictment is framed. (n)

m 2 East. P. O. c. 23. s. 7, p. 1125. 3 Burn.  
Just. *Letter*. And see Lloyd's case, *ante*,

1850.

n Robinson's case, *ante*, 1839.

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